UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CARLOS TREVINO	§	
	§	
Petitioner,	§	
	§	
	§	**Cause No. SA-01-CA-306-FB**
	§	
NATHANIEL QUARTERMAN, Director,	§	
Texas Department of Criminal	§	
Justice, Institutional Division,	§	
Respondent.	§	

PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

THIS IS A CAPITAL DEATH PENALTY CASE

PETITION

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ATTORNEY FOR PETITIONER

ORIGINAL

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THIS IS A CAPITAL DEATH PENALTY CASE

CARLOS TREVINO, Petitioner in the above styled and numbered cause, pursuant to 28 U.S.C. 2254, petitions this Honorable Court to issue a writ of habeas corpus ordering Petitioners release from confinement on the ground that Petitioner is being denied his liberty as a result of an illegal and unconstitutional judgment of conviction for capital murder and sentence of death.

Carlos Trevino, born January 24, 1975, a 21 year old Hispanic father of three, Conceived in the womb of his alcoholic mother, complicated by entrapments of Fetal Alcohol Syndrome (born prematurely, weighing only four (4) pounds at birth), and condemned by abuse both physical (personally experiencing trauma to the head) and mental (witnessing the violent deaths of his cousins), and experiencing neglect (being left alone while his mother would go to bars) since his birth, was convicted of capital murder and sentenced to death. His trial attorneys were unaware and uninformed of his past and woefully failed to prepare for trial. Their efforts did not even approach then current 1989 ABA guidelines for the minimum standards of representation of a capital defendant. They failed to assemble a defense team consisting of a mitigation investigator and a mitigation expert, or a DNA, fiber or gang expert although the State introduced testimony from each at trial. The State proceeded to trial seeking the death penalty after offering Carlos a life sentence which trial counsel was unable to convince Carlos to accept. The State did not seek the death penalty against any of the other co-defendants including Santos Cervantes, the knife wielder and killer of Linda Salinas (the victim), according to a written statement by a third co-defendant Seanido "Sam" Rey - which statement was never revealed to the defense trial attorneys by the State of Texas. All co-defendants received punishments less than the death penalty, with sentences ranging from 25 years to life in prison for crimes ranging from aggravated sexual assault to non-death capital murder. Juan Gonzales, a juvenile who was on probation, present at the crime scene and found by the trial court to be a party (an accomplice as a matter of law), testified at trial and was never criminally charged. Jay Mata, another party to the crime, was similarly not charged. Carlos' initial Writ attorney, who filed both the State and initial Federal Writ and withdrew due to illness, did no

meaningful extra-record investigation, engaged no outside mitigation investigator nor mitigation expert, and uncovered no readily available mitigation evidence or the exculpatory statement of the co-defendant Seanido "Sam" Rey, or any other mitigation evidence included in this petition.. Ultimately, the Petitioner should be allowed to have his case fully, completely and effectively presented to a jury.

TABLE OF CONTENTS

I.

CONFINEMENT AND RESTRAINT

Petitioner is confined on death row at the Polunsky Unit, Texas Department of Criminal Justice, Institutional Division, Livingston, Texas. Douglas Dretke, Director of the Texas Department of Criminal Justice, Institutional Division, is the state official responsible for the confinement of Petitioner. The District Court of Bexar County, Texas, 290th Judicial District, in and for Bexar County, the Honorable Sharon MacRae presiding, entered the judgment and sentence under attack. See attached Judgement of Conviction as Exhibit 1. The judgment was signed on July 7, 1997. See attached Judgment of Conviction as Exhibit 1. Petitioner is confined pursuant to this judgment imposing the death penalty for the offense of capital murder in Cause No. 97-CR-1717D. See attached Judgment of Conviction as Exhibit 1. Petitioner is indigent and has been indigent throughout all prior proceedings in this cause.

II.

HISTORY OF PRIOR STATE COURT PROCEEDINGS

A. TRIAL PROCEEDINGS

Petitioner was arrested on June 13, 1996, charged with Capital Murder allegedly occurring on June 10, 1996, and indicted by the grand jury on April 8, 1997. [CR I, 13].[1] Petitioner entered a plea of not guilty. [CR II, 200; RR XVI, 6-7]. After jury selection was completed, his trial began on June 19, 1997, with the jury returning a verdict of guilty on July 1, 1997. [CR II, 186; RR XXI, 147-147]. The sentencing proceedings were conducted from July 2, 1997, until July 3, 1997, and the jury returned an affirmative answer to special issues number one and two and a negative answer to special issue number three. [CR II, 184-186; RR XXIV 47-50]. As required by the Texas State capital murder scheme, the trial court sentenced Petitioner to death on July 3, 1997. [CR II, 200-201; RR XXIV, 50]. A Motion for New Trial was filed timely on July 25, 1997. The trial court did not order an evidentiary hearing on the motion, and it was overruled by operation of law. [CR Supp., 4].

B. DIRECT APPEAL

Attorney Richard E. Langlois was appointed to represent Petitioner on direct appeal to the Texas Court of Criminal Appeals. The brief for Petitioner was filed on September 4, 1998. The brief is 95 pages long so it has not been attached to this petition.

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[1] The clerk's record from the trial is contained in two volumes and one supplemental and will be referred to as CR and volume and page number and CR Supp. and page number. The court reporter's record from the trial is contained in 25 volumes, numbered 1 through 25 and will be referred to as RR and volume and page number. Proceedings at the Writ Hearing will be cited as RRWH1 and page number. Exhibits used at trial will be referred to by the trial court number as reflected in the record.

The brief for Petitioner raised 19 points of error. Point of Error 1 dealt with error in the denial of Petitioner's Motion for Mistrial at the conclusion of Voir Dire, when Petitioner was denied the opportunity to inquire from the jury their opinions regarding scientific evidence based upon DNA blood analysis. Point of Error 2 dealt with legally insufficient corroborating testimony of the accomplice witness, Juan Gonzales. Points of Error 3-5 dealt with the trial court's error in the admissions of hearsay by witness Juan Gonzales. Point of Error 6 dealt with insufficient evidence to support a finding of "yes" to special issue number one (future dangerousness). Points of Error 7 and 8 dealt with inadmissible evidence of gang affiliation presented at the punishment phase of trial. Point of Error 9 dealt with inadequate instructions to the jury regarding the special issues. Points of Error 10 and 11 dealt with the unconstitutionality of the Texas procedure for assessing the death penalty. Point of Error 12 dealt with the unconstitutionality of the Texas definition of "mitigating evidence" under the Eighth Amendment to the Constitution of the United States. Points of Error 13-15 dealt with the statutory *Penry* special issue and how it is facially unconstitutional under the Texas scheme. Point of Error 16 dealt with the arbitrary imposition of the death penalty in the state of Texas. Points of Error 17 and 18 dealt with the unconstitutionality of the death penalty as cruel and unusual punishment. Point of Error 19 contended that the death penalty was issued on the grounds of racial discrimination in this case.

The Texas Court of Criminal Appeals affirmed the conviction and sentence on April 4, 2001. *Trevino v. State*, 991 S.W.2d 849 (Tex. Crim. App. 1999). A copy of the opinion of the Court of Criminal Appeals is attached as Exhibit 2. A petition for writ of certiorari with the Supreme Court of the United States was not filed.

C. STATE HABEAS CORPUS PROCEEDINGS

On January 19, 1998, the Texas Court of Criminal Appeals appointed attorney Albert L. Rodriguez to represent Petitioner on the post conviction writ of habeas corpus in state court. On April 19, 1999, counsel timely filed with the 290th Judicial District Court Applicant's Post-Conviction Application for Writ of Habeas Corpus. The writ was filed (April 19, 1999) before the direct appeal was completed (June 7, 1999), so no days elapsed from the time that the direct appeal was completed until the filing of the writ.

On July 10, 2000, a hearing was held on the state writ. On December 21, 2000, Petitioner filed his Applicant's Proposed Findings of Fact, Conclusions of Law, and Order of Court. See attached Exhibit 3. On November 7, 2000, the State filed the State's Proposed Order which was adopted in its entirety by the Honorable Sharon MacRae on December 6, 2000. Judge MacRae simply adopted the State's proposed findings of fact and conclusions of law, recommending that relief be denied. The State's Proposed Order is attached as Exhibit 4 and the Court's Order is Attached as Exhibit 5. On April 4, 2001, the Texas Court of Criminal Appeals adopted the findings of fact and the conclusions of law and recommendation of the trial judge and denied relief. A copy of this Order is attached as Exhibit 6.

On August 16, 2004, a subsequent Application for Post conviction Habeas Corpus was filed raising two additional claims; 1) Defense counsel's failure to investigate and present compelling mitigating evidence at the punishment phase deprived Carlos Trevino of his Sixth and Fourteenth

Amendment right to effective assistance of counsel and, 2) The Supreme Court's recent decision in *Atkins v. Virginia*, along with the Eighth and Fourteenth Amendments, prohibits the execution of Carlos Trevino, because he has been diagnosed with Fetal Alcohol Syndrome Disorder.[2] A copy of the Application is attached as Exhibit 7. On November 23, 2005 the Texas Court of Criminal Appeals dismissed the application in an unpublished opinion as an abuse of the writ. A copy of that dismissal is attached as Exhibit 8.

It should be noted that such a dismissal by the Court of Criminal Appeals does not necessarily preclude a federal court's review of the merits of the claims involved. A federal court reviewing a petition for writ of habeas corpus may not reach the merits of a habeas claim where a prior state reviewing court applied an independent and adequate state law ground to deny relief. *Coleman v. Thompson*, 501 U.S. 722 (1991). In the habeas context, the application of the independent and adequate state ground doctrine is not jurisdictional but is grounded in concerns of comity and federalism. *Id.* at 730. Application of the doctrine in federal habeas proceedings advances the principle that "the States should have the first opportunity to address and correct alleged violations of state prisoner's federal rights" and "ensures that the States' interest in correcting their own mistakes is respected in all federal habeas cases." *Id.* at 731, 732.

Whether a state court's resolution of a claim is based on an independent and adequate state ground is for the federal court to determine. *Douglas v. Alabama*, 380 U.S. 415, 422 (1965). To make the determination, a federal court naturally looks to the state court's decision. "When ... a state court decision **fairly appears** to rest primarily on federal law, **or to be interwoven with the federal law**, and when the adequacy and independence of any possible state law ground is **not clear** from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983) (emphasis supplied). *See also Coleman v. Thompson*, 501 U.S. 722, 733 (1991) (reaffirming the *Long* principle). In short, a presumption exists that a state court decision is *not* based upon an independent and adequate state ground if the state court does not **clearly and expressly** state that its decision is "based on bona fide separate, adequate, and independent grounds." *Long*, 463 U.S. at 1041. *See also Coleman*, 501 U.S. at 733; *Harris v. Reed*, 489 U.S. 255, 266 (1989); *Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985). The Supreme Court explained in *Coleman*:

> [F]ederal courts on habeas corpus review of state prisoner claims, like this Court on direct review of state court judgments, **will presume** that there is no independent and adequate state ground for a state court decision when the decision "fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion." In habeas, if the decision of the last state court to which the petitioner presented his federal claims fairly appeared to rest primarily on resolution of those claims, or to be interwoven with those claims, and did not clearly and expressly rely on an independent and adequate state ground, a federal court may address the petition.

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[2] These claims are found at Claims III and IV in the instant petition.

Coleman, 501 U.S. at 734-35 (citations omitted and emphasis supplied). And as the Fifth Circuit has summarized the principle:

> The Supreme Court has supplied us with a useful default rule: We will not apply a procedural default unless the last state court to consider a particular claim "clearly and expressly" relied on an independent and adequate state ground.

Emery v. Johnson, 139 F.3d 191, 195 (5th Cir. 1997). Thus, federal law places the burden on the state court to clearly and expressly show the state-law ground of decision if federal review of a claim is to be precluded.

When resolution of a state procedural law question depends upon a predicate federal constitutional ruling, the state-law prong of the court's holding is not independent of federal law, and a federal court may address the merits of the claim. *Ake v. Oklahoma*, 470 U.S. 68, 75 (1985); *Smith v. Texas*, ___ U.S. ___, 127 S.Ct. 1686, 1698 (2007) (a state court's predicate "error of federal law" in resolving a state procedural question does not preclude federal review); *Delaware v. Prouse*, 440 U.S. 648, 652-653 (1979) (state court decision is not based on an independent state ground where the resolution of a state law question involves an interpretation of what federal law requires to state a claim for relief). Under these circumstances, the federal court may review the claim because "[i]f the state court misapprehended federal law, '[i]t should be freed to decide . . . these suits according to its own local law,'" and not under a mistaken interpretation of federal law. *Prouse*, 440 U.S. at 653 (quoting *Missouri ex rel. Southern R. Co. v. Mayfield*, 340 U.S. 1, 5 (1950)).

As this Court has understood in its prior orders, Texas Code of Criminal Procedure Article 11.071, § 5 ("Section 5"), provides that a subsequent application for writ of habeas corpus filed by a death-sentenced inmate may not be considered by a court unless it contains sufficient specific facts establishing that the current claims have not been and could not have been presented previously because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application. *See* TEX. CODE CRIM. PROC. art. 11.071, § 5(a). Also as this Court is aware, the state court's application of Section 5 may constitute an independent and adequate state law ground that would preclude federal court review in any given case. *See, e.g., Morris v. Dretke*, 413 F.3d 484, 500 n.4 (5th Cir. 2005) (Higginbotham, J., concurring) ("A dismissal under article 11.071(5)(a) **normally** constitutes an adequate and independent procedural bar to federal review." (emphasis supplied)); *Matchett v. Dretke*, 380 F.3d 844, 848 (5th Cir. 2004) ("We have held that Texas's abuse-of-the-writ rule is **ordinarily** an 'adequate and independent' procedural ground on which to base a procedural-default ruling." (emphasis supplied)); *Cotton v. Cockrell*, 343 F.3d 746, 755 (5th Cir. 2003).

Equally clear, however, is that application by the state court of Section 5 does not *necessarily* constitute an independent and adequate state law ground, because "characterizing the failure to meet the threshold requirement as an abuse of the writ does not [of itself] foot the ruling on an independent state ground." *See In Re: Rivera,* No. 03-41069 at *1-*2 (5th Cir. Aug. 6, 2003); *see also Morris*, 413 F.3d at 500 n.4 (Higginbotham, J., concurring) ("[I]n the *Atkins* context, Texas courts have imported an antecedent showing of 'sufficient specific facts' to merit further review,

rendering dismissal of such claims under article 11.071(5)(a) a decision on the merits.") (citing *Stewart v. Smith*, 536 U.S. 856, 860 (2002)); *Emery v. Johnson*, 139 F.3d 191, 194-95 (5th Cir. 1998) ("It is not always easy ... to determine whether a state court decision is based on state procedural grounds or, instead, on the court's interpretation of federal law."). Consequently, in any given case, the district court must actually look to what the state court did to determine whether it is precluded by the independent and adequate state ground doctrine from considering the merits of the claim. If it is unclear whether the state court rested its decision on a state law ground or federal law ground (even if as a component of a state procedural question), the federal court must consider the claim.

The state court decision in this case does not constitute an independent state ground because the state court did not clearly and expressly rely on a ground for dismissal that is independent of federal law. The Court of Criminal Appeals has only recently begun to expound upon how it conducts a Section 5 analysis. In a recent unanimous decision, the CCA, per Judge Cochrane explained that the state court undertakes a two-part test to decide whether an application meets §five(a):

> To satisfy section 5(a)(1), a subsequent application must contain sufficient specific facts establishing that "the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application filed under this article or Article 11.07 because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application." We have interpreted this to mean that, to satisfy Art. 11.071, § 5(a), 1) the factual or legal basis for an applicant's current claims must have been unavailable as to all of his previous applications; and 2) the specific facts alleged, if established, **would constitute a constitutional violation that would likely require relief from either the conviction or sentence**.

Ex parte Campbell, ___ S.W.3d ___, 2007 WL 1217769 (Tex. Crim. App. Apr. 25, 2007) (emphasis supplied). Thus, an application may be denied under Section 5(a)(1) for one of two reasons: (1) the factual or legal basis for the claim was available as to his previous application or (2) the specific facts alleged would not constitute a constitutional violation that would likely require relief.[3] In the course of disposing of Mr. Trevino's application, therefore, the CCA may have considered whether the facts Mr. Trevino alleged in support of the ineffectiveness of his trial counsel constituted a Sixth Amendment violation so as to require relief from his sentence.

Thus, a state court's mere citation to a state statute **where the statute has been interpreted to incorporate questions of federal constitutional law** does not by itself constitute an independent state ground of decision. Applying the "default rule" of *Emery*: the last state court to consider the claim did not "clearly and expressly" rely on an independent and adequate state ground.

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[3] With the issuance of *Campbell*, the CCA has adopted the same approach for claims based on unavailable facts as it did for unavailable law, e.g., the "*Atkins* context." This approach, as Judge Higgenbotham noted in *Morris*, imports an antecedent showing of "sufficient specific facts" to merit further review, rendering dismissal of claims under article 11.071(5)(a) absent clear indication to the contrary a decision on the merits.

Consequently, a procedural default may not be applied, and the Court may consider and decide its merits.

On August 2, 2006, proceedings were stayed in federal court in this matter to allow petitioner to file a second subsequent State Application for Post conviction Habeas Corpus to address newly-found *Brady* and associated ineffective assistance of trial counsel claims. Counsel representing petitioner in federal court filed a motion in the state district court for the appointment of counsel to assist petitioner in pursuing those claims in state court. The state district court refused to act on that request. On October 2, 2008, this Court lifted that stay order, concluding that "there is an absence of available state corrective process and circumstances exist which render the process ineffective to protect the rights of petitioner" pursuant to 28 U.S.C. §2254 (b)(1)(B), and concluded it would address the *Brady* and any related ineffective assistance of counsel claims.

III.

PROCEEDINGS IN THIS COURT PURSUANT TO 21 U.S.C. § 848(q)(4)(B)

On April 12, 2001, petitioner filed with this Court a Motion for Appointment of Counsel pursuant to 21 U.S.C. § 848. This Court appointed Albert Rodriguez as learned counsel on April 13, 2001, to represent Petitioner in this federal habeas corpus proceeding challenging his state criminal conviction for capital murder and sentence of death. Rodriguez did not request the assistance of second chair counsel (ABA Guideline 2.1), nor did he seek the assistance of a fact or mitigation investigator (ABA Guidelines 8.1 - support services, 11.4.1 - Investigation, 7 - Expert Assistance ("counsel should secure the assistance of experts")). This Court's Order Appointing Counsel and Setting Deadlines ordered that the federal habeas corpus petition be filed on or before August 12, 2001. On September 21, 2001, this Court extended the due dates for filing of the federal habeas corpus petition to on or before December 21, 2001. On December 19, 2001, the Court extended the due dates for filing of the federal habeas corpus petition to on or before March 15, 2002. Petitioner's federal writ petition was subsequently filed on March 14, 2002.

On July 31, 2002, Attorney Rodriguez, having been appointed for the purpose of the federal habeas corpus proceeding in this matter, filed a Motion to Withdraw. *See* attached Exhibit 9. In August of 2002, attorneys Warren Alan Wolf and F. Alan Futrell were appointed as substitute Habeas counsel. On June 10, 2004, Petitioner's Habeas counsel filed a Motion to Stay and Abey the Federal Habeas Writ. On June 15, 2004, Judge Fred Biery ordered this matter returned to the 290th District Court for further proceedings in accordance with his Order. *See* attached Exhibit 10. On November 30, 2005, Petitioner notified this Court of the Texas Court of Criminal Appeals' ruling of November 23, 2005. On December 5, 2005, this Court issued a new Scheduling Order directing the petitioner to file his Amended Petition on or before March 3, 2006.

On January 23, 2006, F. Alan Futrell was removed as appointed counsel of record for petitioner, leaving undersigned Warren Wolf alone to represent petitioner in this federal habeas corpus proceeding, despite ABA Guideline 2.1 stating that TWO (2) qualified attorneys should be appointed in every death penalty case. On February 15, 2006, this Court extended the filing

deadline to this Court extended the filing deadline to April 7, 2006 to file Petitioner's amended or supplemental petition. On August 2, 2006, proceedings were stayed in federal court in this matter to allow petitioner to file a second subsequent State Application for Post conviction Habeas Corpus to address newly-found *Brady* and associated ineffective assistance of trial counsel claims. On October 2, 2008, United States District Judge Fred Biery lifted that stay order, concluding that pursuant to 28 U.S.C. § 2254 (b)(1)(B) "there is an absence of available state corrective process and circumstances exist which render the process ineffective to protect the rights of petitioner," and concluded the District Court would address the *Brady* and any related ineffective assistance of counsel claims. Petitioner was ordered to file his amended petition, including all claims petitioner wishes the Court to consider in this proceeding, within 60 days. On November 14, 2008, Judge Biery denied several motions filed by petitioner, including a request to appoint a second chair attorney, and recused himself from this matter. The case was subsequently reassigned to District Judge Xavier Rodriguez. On November 25, 2008, Judge Rodriguez extended the time for filing this writ until December 8, 2008.

PROCEDURAL HISTORY

Petitioner Carlos Treviño, age 21, was arrested on June 13, 1996 and charged with Capital Murder for his participation, along with four others, in the death of Linda Salinas on the night of June 10, 1996. (RR I, p. 13). Nearly one year later, on April 8, 1997, Petitioner was indicated in the 290th District Court, Bexar County, Texas for the offense of Capital Murder, Cause No. 97-CR-1717D. (RR I, p. 13). Petitioner's lead trial counsel was Mario Treviño (no relation to Petitioner, RRWH1 21-22, 34). Attorney Trevino was appointed in July 1996. It was not until April 8, 1997 that Gus Wilcox was appointed as second chair, despite the time requirements of Articles 1.051, 15.17, 26.05 and 26.052 of the Texas Code of Criminal Procedure. Ed Villanueva was appointed as a fact investigator. No mitigation expert was requested or appointed despite ABA Guideline 11.4.2.7 - Expert Assistance. No psychologist, psychiatrist, fiber expert, gang expert, hematologist (to determine the origin of the blood found on the complainant's underwear found twelve feet from where her body was discovered), nor other expert was sought or denied in the preparation of a defense for the guilt-innocence or punishments phases of the trial, despite the recommendation of the minimum standards set forth in ABA Guideline 11.4.2.7 A, B, C and D regarding the investigation of capital cases.

The case was called for trial on June 20, 1997 and Petitioner was convicted of Capital Murder on July 1, 1997, (CR 169). He was sentenced to death on July 3, 1997. (CR 187). On July 25, 1997, a Motion for New Trial was filed asserting ineffective assistance of counsel. This Motion, however, was overruled, without a hearing, by operation of law. (CR Supp. 4). None of the co-defendants received the death penalty. None of the co-defendants went to trial for capital murder. Byron Apolinar received a 25-year sentence for the crime of aggravated sexual assault. Seanido "Sam" Rey received 50 years for the crime of murder. Jay Mata was never charged with a crime. Neither was Petitioner's cousin Juan Gonzales, who was on juvenile probation at the time. Santos Cervantes received a life sentence for the crime of capital murder.

Attorney Richard Langlois, unassisted by second chair counsel despite ABA Guidelines 2.1 ("two qualified postconviction attorneys should be assigned), filed Petitioner's record-based appeal

to the Court of Criminal Appeals. *See* attached Exhibit 11. The conviction and death-sentence were upheld by the Court, and the direct appeal was denied on May 12, 1999. *See Trevino v. State*, 991 S.W.2d 849 (Tex.Crim.App. 1999), attached as Exhibit 12. Separate counsel, Albert L. Rodriguez alone, was appointed to perfect the State Habeas appeal on Petitioner's behalf, despite ABA Guideline 2.1 requiring two (2) qualified postconviction attorneys be appointed. Attorney Rodriguez used all the funds provided by the State of Texas for himself. He decided not to seek the assistance of experts despite ABA Guideline 11.4.1.7 ("Counsel should secure the assistance of experts"). Attorney Rodriguez followed none of these minimum guidelines. Attorney Rodriguez sought appointment in Federal Court tp represent Petitioner Trevino on Federal Habeas Corpus. Once again, Attorney Rodriguez ignored the ABA Guidelines, despicably following suit by requesting no assistance and filing a similar Federal Habeas Corpus Petition arguing only *record-based* claims. *See* attached Exhibit 12. On May 13, 2002, the State filed a Motion for Summary Judgment. *See* attached Exhibit 13.

On July 31, 2002 Attorney Rodriguez, citing a myriad of disabling illnesses, filed a Motion to Withdraw from further representation of Petitioner Treviño in the federal habeas proceedings. *See* attached Exhibit 9. In August of 2002, attorneys Warren Alan Wolf and F. Alan Futrell were appointed as substitute Habeas counsel. On June 10, 2004 Petitioner's new habeas counsel filed a Motion to Stay and Abey the Federal Habeas Writ. On June 15, 2004 United States District Judge Fred Biery ordered the matter Stayed and returned to the Texas' 290th District Court for further proceedings in accordance with his order. *See* attached Exhibit 10. Petitioner filed a successor State Writ alleging mental retardation (Fetal Alcohol Syndrome) and Ineffective Assistance of Counsel. The Writ was denied by the Texas Court of Criminal Appeals as an abuse of the writ. Mr. Futrell was subsequently removed as co-counsel, and Mr. Wolf was left alone to represent Petitioner in this effort, despite attempts to have a second chair counsel appointed in accordance with ABA Guideline 2.1.

In preparing to respond to the State's Motion for Summary Judgment, substitute counsel began by reviewing the filings and efforts of Mr. Rodriguez. In his Motion to Withdraw, Mr. Rodriguez succinctly stated the reasons for his decision to withdraw:

> Over the last few years counsel has become progressively ill from a thyroid condition, diabetes, hypertension, and mental stress and depression from all of the above. Counsel is taking the following daily medications: Synthroid, Cartia, Glucophage, and Zoloft. Dr. Jose Sanchez has strongly urged that counsel discontinue death penalty writ cases as they greatly aggravate his existing medical condition.

See Motion to Withdraw as Attorney for Petitioner, attached as Exhibit 9, p. 2.

It is clear from Mr. Rodriguez's Motion to Withdraw that his medical and psychological conditions were long-standing, growing progressively worse, and taking a serious toll on his day-to-day functioning. It is also clear that practicing death penalty law was exacerbating all of his health problems. His physician "***strongly urged***" him to stop representing death row inmates in post-conviction proceedings, because such cases "***greatly aggravate his existing medical condition***."

Motion to Withdraw as Attorney for Petitioner, Exhibit 9, page 2 (emphases added).

Substitute counsel also noted that Mr. Rodriguez had raised only record-based claims on Petitioner's behalf in both the state and existing federal writ. Counsel immediately became concerned that Mr. Rodriguez' medical and mental conditions had affected his ability to undertake the full range of investigation, research and analysis that is required to properly represent a death-penalty petitioner on his one last opportunity for an adequate review. While Mr. Rodriguez refused to discuss his medical and psychological problems with substitute counsel, their resulting inquiry ultimately led to the identification of two additional, and even more compelling, claims for review.[4] On June 10, 2004, Petitioner's Habeas counsel filed a Motion to Stay and Abey the Federal Habeas Writ so those additional claims could be presented to the State courts for review. On June 15, 2004, Judge Fred Biery ordered this matter returned to the 290th District Court for further proceedings in accordance with his Order. *See* attached Exhibit 10. On November 30, 2005, Petitioner notified this Court of the Texas Court of Criminal Appeals' unpublished ruling of November 23, 2005 rejecting the application as an abuse of the writ. On December 5, 2005, this Court issued a new Scheduling Order directing the petitioner to file his Amended Petition on or before March 3, 2006. Pursuant to the Order of this Court, Petitioner's federal habeas counsel timely sought appointment by the Honorable Judge Sharon MaCrea of the Texas 290th District Court to represent Petitioner in further state habeas proceedings. Judge MaCrea refused to either grant or deny counsel's request to be appointed. The United States District Judge denied the State's Motion to Life Stey, and gave the State Judge an additional 30 days in which to appoint counsel to prosecute the compelling *Brady*/IAC claims. These were the claims that had been brought to the Federal Court's attention and led to the granting of the second Stey. Again, the State Judge refused to either grant or deny the motion for appointment of counsel. This Court subsequently found that the state system was ineffective in protecting the rights of the Petitioner, and ordered that the state exhaustion requirement be waived, and the Stey was ordered lifted. The federal writ was ordered to be filed on December 1, 2008. That deadline was subsequently extended to December 8. 2008. Finally, on December 4, 2008, this Court granted Petitioner's request for independent testing of blood evidence from this case to the extent that it ordered that arrangements be made no later than December 12, 2008 for that evidence to be transported to the independent laboratory. *See* Exhibit 43.

In short, Petitioner Trevino was deprived of competent counsel in state habeas proceedings by the appointment of an attorney who was suffering from serious medical and psychological problems that death penalty postconviciton practice greatly exacerbated, leaving him incompetent from the date of his original appointment as state habeas counsel. Petitioner Trevino did not have the assistance of competent counsel within the meaning of Article 11.071 of the Texas Code of Criminal Procedure and this Court's jurisprudence interpreting that term. Accordingly, this Court should consider the merits of Petitioner's claims and: grant habeas relief and order that the matter be returned for a new trial on the merits or, alternatively, order an evidentiary hearing to determine the merits of petitioner's *Brady* and ineffective assistance of counsel claims, and whether initial State and Federal habeas attorney Rodriguez physical and mental disabilities rendered him incompetent to act as habeas counsel at the time of his initial appointment as state habeas counsel.

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[4] A summary of substitute counsels' findings regarding Mr. Rodriguez' conditions, and the effects thereof, is included in Exhibit 14.

IV.

STATEMENT REGARDING EXHAUSTION OF STATE REMEDIES

Petitioner has exhausted the state remedies for the claims he is presenting in this federal habeas corpus action. Petitioner's claims were either made in the state habeas action, proven at the hearing on the state writ in the trial court but denied in the state court, or were raised and rejected by the state courts in a subsequent state habeas petition. Petitioner has met the burden, pursuant to 28 U.S.C. § 2254(b)(1). That an application for writ of habeas corpus relief of a person in custody pursuant to the judgment of a state court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the state or as excused by the Federal court pursuant to 28 U.S.C. §2254(b)(1)(B).

With regard to the alleged *Brady* violations and the associated ineffective assistance of counsel claims addressed in Claims I and II, the federal district court has determined, in its order of October 2, 2008, that the petitioner "has exhausted his state remedies [with regard to those claims] such that there is an absence of available state corrective process and circumstances exist which render the process ineffective to protect the rights of the petitioner" pursuant to 28 U.S.C. §2254(b)(1)(B).

V.

CLAIMS FOR RELIEF

CLAIM I

PETITIONER CARLOS TREVINO WAS DENIED HIS CONSTITUTIONAL RIGHTS PURSUANT TO THE SUPREME COURT'S HOLDING IN *BRADY V. MARYLAND*, 373 U.S. 83, 82 S.CT. 1194, 10 L.ED.2D 215 (1963) WHEN THE PROSECUTION WITHHELD FROM DEFENSE COUNSEL THE STATEMENT OF A CO-DEFENDANT IDENTIFYING A THIRD CO-DEFENDANT AS ADMITTING TO KILLING THE COMPLAINANT

CLAIM II

DEFENSE COUNSEL RENDERED INEFFECTIVE ASSISTANCE TO PETITIONER CARLOS TREVINO IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BY FAILING TO EFFECTIVELY USE THE INFORMATION PRESENT IN THE STATEMENT OF A CO-DEFENDANT IDENTIFYING A THIRD CO-DEFENDANT AS ADMITTING TO KILLING LINDA SALINAS

CLAIM III

DEFENSE COUNSEL'S FAILURE TO INVESTIGATE AND PRESENT COMPELLING MITIGATING EVIDENCE AT THE PUNISHMENT PHASE DEPRIVED CARLOS TREVIÑO OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

CLAIM IV

THE SUPREME COURT'S RECENT DECISION IN *ATKINS V. VIRGINIA*, ALONG WITH THE EIGHTH AND FOURTEENTH AMENDMENTS, PROHIBITS THE EXECUTION OF CARLOS TREVIÑO, BECAUSE HE HAS BEEN DIAGNOSED WITH A FETAL ALCOHOL SYNDROME DISORDER.

CLAIM V

THE STATE COURT FAILED TO HOLD AN EVIDENTIARY HEARING WHEN TRIAL COUNSEL, IN A MOTION FOR NEW TRIAL, CLAIMED HE WAS INEFFECTIVE, IN VIOLATION OF PETITIONER'S RIGHT TO DUE PROCESS AND THE SIXTH AMENDMENT.

CLAIM VI

PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL, IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, BECAUSE HIS TRIAL COUNSEL PERFORMED DEFICIENTLY AND THAT DEFICIENT PERFORMANCE PREJUDICED PETITIONER.

CLAIM VII

THE AGGRAVATING FACTORS EMPLOYED IN THE TEXAS CAPITOL SENTENCING SCHEME ARE VAGUE AND DO NOT PROPERLY CHANNEL THE JURY'S DISCRETION IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

CLAIM VII

ARTICLE 37.071 OF THE TEXAS CODE OF CRIMINAL PROCEDURE IS UNCONSTITUTIONAL IN THAT ITS 12-10 RULE MAY ARBITRARILY FORCE THE JURY TO CONTINUE DELIBERATING AFTER EVERY JUROR VOTED TO ANSWER A SPECIAL ISSUE IN FAVOR OF THE APPLICANT.

VI.

STATEMENT OF FACTS

Petitioner Carlos Treviño was arrested on June 13, 1996, and charged with Capital Murder, along with four others, in the death of Linda Salinas on the night of June 10, 1996. After sitting in jail for nearly a year, Petitioner was indicted on April 8, 1997 in the 290th District Court, in Bexar County, Texas, for the offense of Capital Murder in Cause No. 97-CR-1717D. In July of 1996, within thirty (30) days of Carlos' arrest, attorney Mario Treviño was appointed as lead counsel. Attorney Treviño was a former first chair felony prosecutor with the Bexar County District Attorney's Office, and an experienced capital trial counsel. Shortly thereafter, on August 13, 1996, the trial court appointed Edward Villanueva as a fact investigator in the case. Attorney Treviño immediately identified concerns associated with the case, balancing the rape and murder of a young girl with a client that was in a gang and on parole at the time of the offense. It quickly became evident, however, that the daunting nature of the case outweighed Treviño's ability to act as an advocate for his client, resulting in a denial of the minimum standards of the ABA Guideline 11.2.B ("Counsel in death panalty cases should be required to perform at the level of an attorney reasonably skilled in the specialized practice of capital representation, zealously committed to the capital case. . . "). As such, Mario Treviño's failure to look beyond his own predetermined conviction of his client resulted in what can at best be described as a paltry effort to defend and represent Carlos during his capital murder trial. For whatever reason, Petitioner's trial counsel conducted a *de minimus* investigation into Carlos' social and family history. Counsel failed to inquire into *any* area of Carlos' life experiences, and did not meet with or talk to any of Carlos' family members, educators, social professionals, medical doctors, or mental health experts, prior to trial. Moreover, trial counsel's failure to ever make an opening statement foreshadowed the inadequate and inept performance that pervaded the guilt-innocence and punishment phases of the trial. Treviño declined to make an opening statement, suggesting instead that he would "wait for the appropriate time." Such "time," not surprisingly, never presented itself to trial counsel. When the punishment phase of the trial concluded, the sum total of witnesses presented by the defense was one (1). Moreover, the witness was Carlos' aunt, whom Mario Treviño had met for the first time in the courthouse cafeteria during lunch, shortly before she took the witness stand that afternoon. In a statement of facts exceeding twenty-five (25) volumes, the sole defense witness' testimony is recorded in five (5) pages, including counsel's self-introduction and questions. None of this even approached the minimum standards for the sentencing phase of a capital trial of the ABA Guideline 11.4.1 - Investigation ("Counsel should conduct independent investigations relating to the guilt/innocence phase and to the penalty phase of a capital trial"), 11.8.1 ("the sentencing phase of a death penalty trial is different from sentencing proceedings in other criminal cases"), and 11.8.3 F1, 2, 3 (regarding witnesses at the sentencing phase). Such a deficient effort resulted in a reversal in *Rompilla v. Beard*, 545 U.S. 374, 390, 125 S.Ct. 2456, 2467 (2005).

If waiving his 'opening statement' was a warning of the poor performance to come, such trial performance was conceived almost a year earlier. Shortly after Mario Treviño was appointed to Petitioner's case, a deal was offered by the Bexar County District Attorney's Office for a life sentence in exchange for Carlos testifying for the State, against one or more of the four co-defendants in the case. However, during the process of providing a statement to the prosecutor,

Carlos changed his mind. *See* Affidavit of Mario Treviño, Affidavit of Carlos Treviño and Transcript of Writ Hearing, pp. 27-31, attached hereto as Exhibits 15, 16 and 17, respectively. Trial counsel later explained Carlos' shift, without detail or elaboration, as a result of pressure from Carlos' gang affiliation. *See* Affidavit of Mario Treviño, Exhibit 15. Carlos explained the change of heart due to a lack of trust between himself and his trial counsel. *See* Affidavit of Carlos Treviño, Exhibit 16. Regardless, Treviño was able to secure a subsequent *second* offer from the District Attorney's Office, which did not require Carlos to testify. By this point, however, communication had broken down between Attorney Treviño and Carlos. The plea offer for a life sentence was deemed rejected by the State. The result for Mario Treviño was a bad trial experience. The result for Carlos Treviño, a sentence of death. This deadly result could have been avoided with a simple adherence to ABA Guideline 11.6.1, 2, 3 and 4. The plea negotiation process would have cured an unfortunate result.

In a case involving 39 state witnesses, 1 defense witness, 117 exhibits and 2795 pages of transcript, trial counsel failed to follow even the most minimal standards set forth by court precedence and that of common sense. The records of the Bexar County Sheriff's Office (also referred to as "Detention Center" or "Jail"), indicate, Attorney Treviño met with Carlos ***a total of four (4) times*** from his initial arrest until the day of jury selection for his Capital Murder charges. According to the records, during the year he represented Carlos, Treviño spent a grand total of four (4) hours and twenty-five (25) minutes, including time which counsel signed in at the front desk and waited for officers to produce his client to the visitation booth, conferring with his death-eligible client prior to trial. Significantly, the **first** recorded visit with petitioner by Attorney Treviño was February 9, 1997, **seven months after his appointment** in July 1996. The **last** recorded attorney-visit was on June 1, 1997, the day before jury selection started, and lasted for ***a total of thirty (30) minutes***.

Date of Visit	Time In/Time Out	Length of Visit
February 9th, 1997	16:51/17.55	1 hour and 4 minutes
February 27th, 1997	10:42/12:05	1 hour and 23 minutes
May 8th, 1997	11:15/12:43	1 hour and 28 minutes
June 1st, 1997	16:15/16:45	30 minutes

See Business Records of Bexar County Sheriff's Office, attached hereto as Exhibit 18.

Ironically, the lack of communication was not a result of unforeseen or unknown barriers. According to Attorney Treviño, there were no difficulties in communicating with Carlos, either language issues or any unusual restrictions placed by the jail. *See* RRWH1 23, Exhibit 17. Attorney and client had access just as any other attorney and client in Bexar County are allowed. There was, however, a considerable difficulty in exerting any significant effort on the part of defense counsel

during the year leading up to trial.

Thus, although trial counsel, a professed criminal defense attorney for over seventeen (17) years, was obviously very concerned with proceeding to trial on this matter, clearly he did not spend any reasonable time explaining the pros and cons of the second offer extended by the District Attorney's Office. *See* RRWH1 34, Exhibit 17. Trial counsel bore the responsibility to ensure his client understood the ramifications of his decisions, outside of influences from the prison walls. The amount of time alone tells this Honorable Court that trial counsel could not and did not fulfill his responsibility.

Notwithstanding the appointment of counsel and an investigator, nearly one year before the start of trial, scarcely ***any*** investigation was conducted on Carlos Treviño's behalf. Neither his trial attorneys nor his fact investigator made an effort to find or develop any mitigation evidence, preventing the development and potential presentation of such during the guilt and/or penalty phase, contrary to ABA Guideline 11.1, Establishment of Performance Standards. According to trial counsel:

> "Well, really, what we tried to do was to find a family member that could give us some idea as to where or how Mr. Treviño grew up. What was going on with his life. What were the circumstances, you know, regarding his past. And we tried to find them, but really, I don't think we came up with any witnesses. We tried to contact his mother as best we could. She was from out of the city."

See RRWH1 46, Exhibit 17.

Clearly, for most capital trial attorneys, this would have been a starting point. However, as with every other aspect of the trial, that attempt to find "a family member" yielded little, and the counsel's pre-trial investigation ended soon after it began. Although Treviño and Villanueva knew Carlos' mother lived only 100 miles from San Antonio in Bastrop County, Texas, they never made contact with her. (Treviño Affidavit). Trial counsel's efforts to find and develop witnesses who might provide beneficial testimony, apparently emanated from one of the limited conversations he had with Carlos. At the State Writ Hearing, Attorney Treviño indicated "He (Carlos) gave me no names." *See* RRWH1 42, Exhibit 17. Although he was certain Villanueva must have looked into Carlos' educational background, Mario Treviño did not know any of the results of that investigation. Certainly, none were introduced. *See* RRWH1 48, Exhibit 17.

Often times, in Capital cases, trial counsel complain their cases suffer as a result of limited resources. Not Attorney Trevino. Trial counsel made no request for a mitigation expert because they "were not used much at the time of trial" in Bexar County. *See* Affidavit of Mario Treviño, Exhibit 15. This, in spite of ABA Guideline 8.1 - Supporting Services ("each jurisdiction should provide appointed counsel . . . with investigative, expert, and other services necessary to prepare and present an adequate defense"). More specifically, although he professed gang violence a major obstacle in the presentation of his case, Attorney Treviño, never even considered hiring an expert in the field of prison violence or prison gangs. Even after acquiring the knowledge that his client rejected a plea offer based upon pressure from prison gang members. *See* Affidavit of Mario

Treviño, Exhibit 15.

On April 8, 1997, approximately three quarters (3/4) of a year after attorney Trevino was appointed, Gus Wilcox, an experienced capital trial counsel and former first chair Assistant District Attorney with the Bexar County District Attorney's Office, was appointed as trial co-counsel to assist Mario Treviño in this matter. As with everything else in this case, this last minute appointment was too little, too late. That appointment was made only fifty-four (54) days before jury selection began and seventy-three (73) days before the trial began.

By the time of the trial the prosecutors had not tendered to defense counsel any documents that included the statement of Seanido San Rey, which documents form the basis of the second motion to stay and abey in the Federal District Court, and gave rise to the Brady and associated Ineffective Assistance of Trial Counsel claims contained in Claims I and II.

On July 1, 1997, Carlos Treviño was found guilty of the Capital Murder of Linda Salinas. The punishment phase of the trial began, on July 1, 1997, lasting less than two full days. Testimony was presented to the Jury from ten (10) witnesses for the State, and one (1) defense witness. A brief summary of their respective testimony is as follows:

State's Witnesses:

A. Ralph Loony testified about the Defendant's prior adult criminal record, ***without being cross-examined by defense counsel.*** (RR, XXIII, pp. 4-11).

B. Loraine Reagan testified regarding the Defendant's prior juvenile criminal record. (RR, XXIII, pp. 12-36).

C John Gutierrez, an investigator for the Bexar County Sheriff, testified about his prior dealings and experiences with the Defendant, ***without being cross-examined by defense counsel.*** (RR, XXIII, pp. 38-40).

D. Dario Gonzales, a Deputy District Clerk, testified about the Defendant's criminal records in Bexar County, ***without being cross-examined by defense counsel.*** (RR, XXIII, pp. 41-47).

E Maria Espinoza testified about her experience when, years earlier, while was baby-sitting for a couple, Carlos was arrested for the theft of a vehicle which belonged to the parents for whom she was baby-sitting, also ***without being cross-examined by defense counsel.*** (RR, XXIII, pp. 48-52).

F. Nelson Atwell, an attorney and former Assistant District Attorney of Bexar County, testified about having had his Cadillac automobile stolen in 1990, implicitly by Carlos, ***without being cross-examined by defense counsel.*** (RR, XXIII, pp. 54-55).

G. John Riojas, a San Antonio Police Office testified about his interview with Maria Espinoza, concerning the vehicle theft she had reported, ***without being cross-examined by defense counsel.***

(RR, XXIII, pp. 57-64).

H. Jaime Aleman, a San Antonio Police Officer, testified about having arrested the Defendant, years earlier, for unlawfully carrying a prohibited weapon. (RR, XXIII, pp. 65-77 and 80-82).

I. Bob Morrill, an employee of the Institutional Division of the Texas Department of Criminal Justice, provided a long and detailed history of gangs and gang activity in the Institutional Division, and further testified on the Defendant's gang affiliation., ***without being challenged by defense counsel on the basis of hearsay, right of confrontation, or the relevance and reliability of the proposed "expert" testimony***. (RR, XXIII, pp. 90-132).

J. Juan Gonzales, a co-defendant, testified again, after having done so during the guilt-innocence phase of the trial, concerning statements Gonzales says the Defendant made shortly after the death of the victim, regarding where and how the Defendant learned to snap people's necks, and use a knife. (RR, XXIII, pp. 83-89).

Defense Witnesses:

Juanita DeLeon, Carlos' Aunt, testified that she never knew the Defendant's father; that the Defendant's mother had an alcohol problem and couldn't make it from Elgin (Bastrop County), Texas, where she then lived; that the Defendant had been a good boy, growing up; that her children always liked to play and go with the Defendant to do things; and that the Defendant did roofing work from time to time. She spoke briefly about the Defendant's common-law wife and the young child they had; and that she knew the Defendant didn't do the things he had [by then] been convicted of doing. (RR, XXIII, pp. 135-140), *see also* Affidavit of Juanita Treviño DeLeon, attached as Exhibit 19.

Trial counsel presented ***no evidence*** on Carlos' family history, his educational background, his medical background or his accident-related head injuries, his intellectual capacity, his psychological or psychiatric profile, his personality profile, or his lack of propensity for committing continuing acts of violence. Moreover, although the funds were clearly available, trial counsel did not hire, or request to hire, experts regarding Carlos' gang affiliation, a mitigation expert, a psychological expert to explain the effects of Fetal Alcohol Affect or a psychological expert to discuss future dangerousness. *See* ABA Guideline 11.4.1.2.C - Investigation (Collect information relevant to **medical history** (mental and physical illness or injury, alcohol and drug use, birth trauma, developmental delays), **educational history** (achievement, performance and behavior) . . . **family and social history** (including physical and sexual or emotional abuse, prior adult and juvenile record) . . . and religious and cultural influences.)

STATEMENT OF FACTS - 2

Petitioner had been drinking with Juan Gonzales, Seanido Rey, Santos Cervantes, Brian Apolinar and Jay Mata when they decided to go and purchase more beer at a convenience store. [RR XVIII, 171-174; RR XVI, 151-156]. At the last moment, Mata decided not to go. *Id.* Complainant, Linda Salinas, was using the pay telephone at the convenience store and Brian Apolinar recognized

her. [RR XVIII, 176-177]. She was a friend of Santos Cervantes and accepted a ride to her friend's house. [RR XVIII, 177]. Instead of taking her to the friend's house, she was taken to Espada Park, a part of the San Antonio River on the south part of San Antonio. [RR XVIII, 180-181]. On the way to the Park, Cervantes was kissing Salinas in the car, and removed her brassiere. Salinas did not resist Cervantes' actions. At the park she was repeatedly sexually assaulted vaginally, anally, and orally. [RR XVIII, 182-187; RR XIX, 65- 67]. Witness Juan Gonzales stated that he witnessed Santos Cervantes take Salinas into the woods alone. RR XVIII, 181. He also testified that he witnesses Santos Cervantes and Brian Apolinar sexually assaulting the complainant while Petitioner was holding her down. [RR XVIII, 195]. Gonzales asked Santos Cervantes why they had killed the complainant, and Cervantes told him to mind his own business. [RR XVIII, 157]. Defendants drove back to Jay Mata's (neither tried nor indicted) house to burn the complainant's backpack. [RR XIX, 6-7; RR XVI, 157-158]. Juan Gonzales, at the punishment phase, testified that Santos Cervantes stated to Petitioner, "that it was cool about -- . . . neat about Carlos snapping her neck." [RR XXIII, 84]. Gonzales testified that petitioner replied that he had "learned how to kill in prison," and that Petitioner had also learned how to use a knife in prison. {RR XXIII, 84]. The testimony about the trauma to the neck was not relevant and the testimony about the knife became paramount.

On June 10, 1996, at approximately 2:00 p.m., the body of Linda Salinas was found at Espada Park. [RR XVI, 215-217]. During the autopsy, Dr. Vincent Dimaio, Chief Medical Examiner for Bexar County, Texas found that complainant had blood on the left side of the face, neck, chest, abdomen, legs, forearms, and hands. {RR XIX, 61]. Complainant had bruises on the right and left breast, and two stab wounds on the left side of her neck, inflicted with a dull top-knife, with a cutting edge. [RR XIX, 62-63]. The cause of death was the result of severe bleeding from a severed carotid artery located in the neck. [RR XIX, 63-68]. Complainant's vagina was bruised, and there was bruising and tearing in and around her anus. [RR XIX, 65- 66]. Despite the testimony of Juan Gonzales, there was no bruising to the neck of the complainant. *Id.*.

STATEMENT OF FACTS - 3

Evidence Related to Guilt-Innocence

The evidence surrounding the facts of the Crime showed that on June 9, 1996 5 young Hispanic males [Santos Cervantes- D.O.B.: 3/8/78 (18 yrs.), Seanido "Sam" Rey, Brian Apolinar and Carlos Trevino] and one juvenile Hispanic male Juan Benito "Thatie" Gonzales-D.O.B.: 9/19/81 (14 yrs.) (Carlos' cousin) attended a party at Jay Mata's house. The group decided to go purchase some more beer at the Pic Nic convenience store off Division and South Flores. While Apolinar was pumping the gas, Rey went inside the store to pay for the gas. Cervantes saw Linda Salinas, the complainant in the case, talking on the pay phone outside the store. Cervantes approached Salinas and offered her a ride. This new passenger was unexpected and added on the spur of the moment. Salinas got into the 1983 Pontiac 4-door Sunbird with the 5 young males. She sat on Cervantes' lap who was sitting in the front passenger seat. Apolinar was the driver. Trevino, Gonzales and Rey were in the back.

As they drove away, Cervantes began to disrobe Salinas. He stripped her from the waist up, taking off her bra, leaving her bare-chested. They began to kiss and embrace each other in front

of the others. Apolinar drove the group to Espada Park. Cervantes took Salinas out of the car and into the woods when he proceeded to rape her. *See* attached written statement of Seanido Rey, Exhibit 35. The ensuing contradictory testimony was elicited at trial by the State: The rest of the group followed shortly into the woods. Apolinar joined in by holding Salinas down. Rey was the next to sexually assault. Cervantes then ordered Salinas to turn over onto her stomach or he would strike her and she reluctantly complied. Trevino then told his cousin, Gonzales, it was his turn. Gonzales declined and returned to the car as a lookout. RR XVIII,185. Gonzales later returned to find Cervantes engaged in forcible anal intercourse with Salinas. Apolinar and Rey alternately forced their penises into Salinas' mouth, with Rey restraining Salinas during those times when he was not forcing Salinas to perform fellatio on him. RR XVIII, 185-186. Trevino participated by restraining her. RR XVIII, 194-195.

According to Gonzales it was Rey who told Cervantes "we don't need any witnesses." Cervantes repeated the idea down the line to Trevino who said "we'll do what we have to do. RR XVIII, 190-191.

The testimony of the medical examiner showed that Salinas had been stabbed in the neck twice with a knife, partially severing the carotid artery, and that she bled to death as a result. In response to a question about snapping complainant's neck Dr. Dimaio testified, "All I can say is there is no evidence that anyone tried it." RR XIX, 90.

As the quintet drove away Gonzales testified that Cervantes told Trevino that Trevino's snapping of Salinas' neck and his use of the knife was "cool" to which Trevino in youthful machismo and boastful braggadocio attempted to impress his peers by replying that he had "learned how to kill people in prison and use a knife." RR XXII, 83.

Juan Gonzales further stated it was Cervantes who, two days later broke the knife and threw it in a river. RR XIX, 29.

Cervantes was heard to say regarding Salinas' death, "Fuck that bitch, she didn't want to give it up so I stabbed her." *See* Exhibit 35. Cervantes later took Salinas' backpack which she left in the car after returning to Jay Mata's house and asked for some gasoline to get rid of the "evidence." All of the boys watched Cervantes burn the book bag. Trevino left with Gonzales and returned to his aunt's house.

The State offered evidence through a forensic fiber expert that fibers found on a pair of white panties collected at the crime scene were consistent with fibers belonging to Trevino RR XVII, 142-143. No *Kelly*[5] hearing was held to determine if this soft/junk science had any validity. No expert witness was presented by Trevino's lawyers to rebut or explain such ridiculous testimony. No request for funds to hire such an expert, was made by the attorneys for Trevino despite knowledge that this "evidence" was in existence and that the State intended to introduce it. *See* ABA Guidelines 11.4.1.7 - Investigations, Expert Assistance (Counsel should secure the assistance

[5] *Kelly v. State*, 824 S.W.2d 568 (CCA 1992), is the Texas analog of *Daubert v. Merrell Dow Pharmaceuticals, Inc*, 113 S.Ct. 2786, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) regarding the admissibility of expert evidence.

of experts for any portion of the prosecution's case).

The State introduced a fingerprint expert to prove Trevino's prints were found inside Apolinar's car. RR XVIII, 34 No fingerprint expert was utilized by the petitioner's defense team to verify the State's experts findings nor were funds requested by the defense team for such a fingerprint examiner. *See again*, ABA Guideline 11.4.1.7.

Lastly, the State introduced a forensic serologist who discovered a mixed blood stain that was found on Salinas' underwear which was submitted for DNA testing RR XIX, 118, 127. The results of that analysis excluded Cervantes, Rey, Apolinar and Gonzales as donors but did not exclude Salinas and Trevino RR XIX,130-32. No test was conducted to determine whether or not the preservative EDTA was present in that blood stain - a test that could have determined when the blood that was similar to Petitioner's was introduced onto the complainant's underwear.

The attorneys for Trevino sent the State's serology test results to GeneScreen but did not have them check for cross-contamination or for the presence of EDTA. This was important because Trevino insisted his blood could not have been introduced to any article of clothing of Salinas because he had no open wounds on his body on the night of the incident. His attorneys did not follow up on this possibility by requesting their expert to check for the presence of EDTA and possible cross-contamination of the submitted DNA samples.

This failure of the defense to follow up a possible defense suggested by the petitioner caused the petitioner to totally lose faith in his counsel which ultimately led to his refusal to accept the offer for a life sentence which was extended by the prosecutor prior to trial. This failure violated ABA Guideline 11.2 Minimum Standards, to be ". . . zealously committed to the capital case."

The defense team did not have their DNA expert in Court to assist them in fashioning a cross examination of the State's expert, nor was the defense DNA expert there to testify to any other deficiencies he may have identified with the State's expert's testimony. *See* ABA Guideline 11.8.3.2 ("counsel should consider . . . expert witnesses . . .to rebut expert testimony presented by the prosecutor").

After the trial, the defense fact investigator Ed Villanueva, after interviewing the jurors found that the DNA evidence to be quite compelling to them. *See* Exhibit 33.***

Evidence related to Punishment

The State introduced evidence of Carlos' "violent" criminal history which mainly consisted of burglaries and car thefts. However, unlike his co-defendant, he had never been convicted of nor arrested for an assault, aggravated assault, murder, aggravated sexual assault, kidnaping or other violent crime. Although he had been arrested for possession of a weapon there was no testimony that he had ever used the weapon.

The State introduced his juvenile record though State Juvenile Probation Officer Lorraine Reagan. However the defense team never investigated by searching or using a mitigation

investigator or mitigation expert which they never requested although the 1989 ABA Guidelines in effect at the time of the trial required same to be secured (Guideline 11.4.1 D. 7.)

The defense team did not even attempt to seek from the Court the funds to employ such investigative experts. When confronted with the guidelines Mario Trevino replied "It just wasn't done in Bexar County. (regarding mitigation experts and investigators). *But see* ABA Guideline 8.1 - Supporting Services.

The juvenile records as well as Mrs. Reagan were readily available but never seen or reviewed by the defense. A custody review would show Carlos was a follower who got in trouble in an impulse driven situation following others. Carlos was a good probationer who did well while on supervision (affidavit of Lorraine Reagan at exhibit 30). The jury never heard that testimony.

The State further introduced a "gang expert" Bob Merril, an employee of the Institutional Division of the Texas Department of Criminal Justice. Mr. Merril was not challenged under Rule 702, Tex. Code Crim. Proc. The Defense did not introduce nor did they seek the funds to hire their own expert to assist them as well as the jury to understand the history of prison gangs and that membership in prison gangs was a way of staying alive in prison. There was no evidence that Carlos committed any act of violence in furtherance of his gang affiliation nor that he subscribed nor had ever seen a document reportedly to be the constitution or bylaws of the Hermanos Pisterleros gang. *See* ABA Guideline 11.8.3 - Preparation for the Sentencing Phase, F2 (counsel should consider the use of experts to rebut expert testimony presented by the prosecution).

VII.

ARGUMENT AND AUTHORITIES

ARGUMENT: CLAIM I

PETITIONER CARLOS TREVINO WAS DENIED HIS CONSTITUTIONAL RIGHTS PURSUANT TO THE SUPREME COURT'S HOLDING IN *BRADY V. MARYLAND*, 373 U.S. 83, 82 S.CT. 1194, 10 L.ED.2D 215 (1963) WHEN THE PROSECUTION WITHHELD FROM DEFENSE COUNSEL THE STATEMENT OF A CO-DEFENDANT IDENTIFYING A THIRD CO-DEFENDANT AS ADMITTING TO KILLING THE COMPLAINANT

A. Clearly Established Federal Law

Few constitutional principles are more firmly established by Supreme Court precedent than the rule that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Banks v. Dretke,* 540 U.S. 668, 691, 124 S.Ct. 1256, 1272, 157 L.Ed.2d 1166 (2004); *Brady v. Maryland,* 373 U.S. 83, 87, 83 S.Ct. 1194, 1196-97, 10 L.Ed.2d 215 (1963); *Gutierrez v. Dretke,* 392 F.Supp.2d 802, 850 (W.D.Tex.2005), *Certificate of*

Appealability denied, 201 Fed.Appx. 196 (5th Cir.2006) (not published), *cert. denied,* --- U.S. ----, 127 S.Ct. 1297, 167 L.Ed.2d 112 (2007). The Supreme Court has consistently held the prosecution's duty to disclose evidence material to either guilt or punishment, i.e., the rule announced in *Brady v. Maryland,* applies even when there has been no request by the accused. *Banks v. Dretke,* 540 U.S. at 690, 124 S.Ct. at 1272; *Strickler v. Greene,* 527 U.S. 263, 280, 119 S.Ct. 1936, 1948, 144 L.Ed.2d 286 (1999); *United States v. Agurs,* 427 U.S. 97, 107, 96 S.Ct. 2392, 2399, 49 L.Ed.2d 342 (1976). This duty also applies to impeachment evidence. *Strickler v. Greene,* 527 U.S. at 280, 119 S.Ct. at 1948; *United States v. Bagley,* 473 U.S. 667, 676 & 685, 105 S.Ct. 3375, 3380 & 3385, 87 L.Ed.2d 481 (1985).

The rule in *Brady* encompasses evidence known only to police investigators and not personally known by the prosecutor. *Strickler v. Greene,* 527 U.S. at 280-81, 119 S.Ct. at 1948; *Kyles v. Whitley,* 514 U.S. 419, 438, 115 S.Ct. 1555, 1568, 131 L.Ed.2d 490 (1995). "[T]he individual prosecutor has a duty to learn of any favorable evidence *known to the others acting on the government's behalf* in this case, including the police." *Strickler v. Greene,* 527 U.S. at 281, 119 S.Ct. at 1948 (emphasis added); *Kyles v. Whitley,* 514 U.S. at 437, 115 S.Ct. at 1567. The duty imposed by *Brady* is not merely a negative prohibition against the prosecution's active concealment of exculpatory, mitigating, or impeachment evidence; it imposes an affirmative duty on the prosecution to disclose to the defense all such evidence in the possession of those "acting on the government's behalf." *Strickler v. Greene,* 527 U.S. at 281, 119 S.Ct. at 1948; *Kyles v. Whitley,* 514 U.S. at 437, 115 S.Ct. at 1567. This duty applies with equal force regardless of whether the prosecution's failure to disclose was negligent or malicious. *See Banks v. Dretke,* 540 U.S. at 691, 124 S.Ct. at 1272 ("the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."); *Brady v. Maryland,* 373 U.S. at 87, 83 S.Ct. at 1196-97 (holding the same).

The Supreme Court has consistently held the prosecution's duty to disclose evidence material to either guilt or punishment applies even when there has been no request by the accused. *Banks v. Dretke,* 540 U.S. at 690, 124 S.Ct. at 1272; *Strickler v. Greene,* 527 U.S. at 280, 119 S.Ct. at 1948; *United States v. Agurs,* 427 U.S. at 107, 96 S.Ct. at 2399.

Under clearly established Supreme Court precedent, there are three elements to a *Brady* claim: (1) the evidence must be favorable to the accused, either because it is exculpatory or because it is impeaching; (2) the evidence must have been suppressed by the State, either willfully or inadvertently; and (3) the evidence must be "material," i.e., prejudice must have ensued from its non-disclosure. *Banks v. Dretke,* 540 U.S. at 691, 124 S.Ct. at 1272; *Strickler v. Greene,* 527 U.S. at 281-82, 119 S.Ct. at 1948. Evidence is "material" under *Brady* where there exists a "reasonable probability" that had the evidence been disclosed the result at trial would have been different. *Banks v. Dretke,* 540 U.S. at 698-99, 124 S.Ct. at 1276.

The Supreme Court has emphasized four aspects of the *Brady* materiality inquiry. First, a showing of materiality does *not* require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted in the defendant's acquittal. *See United States v. Bagley,* 473 U.S. at 682, 105 S.Ct. at 3383 (expressly adopting the "prejudice" prong of the *Strickland v.*

Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), analysis of ineffective assistance claims as the appropriate standard for determining "materiality" under *Brady*). Second, the materiality standard is *not* a sufficiency of the evidence test. *Kyles v. Whitley,* 514 U.S. at 434-35, 115 S.Ct. at 1566. Third, once materiality is established, harmless error analysis has no application. *Kyles v. Whitley,* 514 U.S. at 435-36, 115 S.Ct. at 1566-67. Finally, materiality must be assessed collectively, not item by item. *Kyles v. Whitley,* 514 U.S. at 436-37, 115 S.Ct. at 1567.

B. Argument

1. At Trial, the State placed the murder weapon in Petitioner's hands through the testimony of the only person present at the scene who was not charged with capital murder.

"This guy right here stuck a knife right here in the neck of Linda Salinas and killed her . . ." RR XXII, 89. Thus began the State's opening argument in the July 1997 capital murder trial of Petitioner Carlos Trevino. The prosecutor continued by emphasizing the testimony of the State's star witness, Juan Gonzales. *Id.*, 93-94.

At the time of the offense in June 1996, Gonzales was a 14-year old juvenile. By his own admission, he was present when 15-year old Linda Salinas was sexually assaulted and murdered. *See* RRXVIII, 137-145, 175-192. The trial court found that he was an "accomplice as a matter of law," as to all events that happened that night, and included that finding in the Court's charge to the jury. RRXXI, 5. Gonzales was the only person present who was not charged with capital murder, or any other offense related to the events of that night. RR XVII, 43; RR XIX, 40. It was Gonzales' testimony about statements he claimed to have heard Petitioner say that was key to putting the knife in Petitioner's hands. *See*, RR XVIII, 190-191; RR XIX, 5. There was no other evidence presented at trial placing the murder weapon in Petitioner's hands, or addressing his culpability in Linda Salinas' death. Even the State's argument for conviction under the parties liability theory was based on Gonzales testimony. RR XXII, 102-106.

Although Gonzales testified that everyone was present when Petitioner made those critical statements, there was no record of them until he gave his second written statement in March 1997 - 10 months after his first statement in June 1996 and 4 months before trial - to an investigator with the Bexar County District Attorney's Office. RR XVIII, 154-165. In that statement, Gonzales also noted that he had seen Santos Cervantes - another person present at the scene - with a knife two days before the murder, and that two days after the murder Santos had told him that he had broken the knife and thrown it into the river. RR XIV, 29-30. He also noted that he had asked Santos "Why did you kill Linda Santos?" There was a heated discussion between the State and defense - out of the presence of the jury - about whether that statement had been disclosed to the defense after trial. *Id.*

The theme of the State's argument at punishment was again to put the knife in the hands of Petitioner Carlos Trevino by way of the testimony of Juan Gonzales. During opening argument, the State argued "whether you chose to believe he actually plunged that knife into her or not, you know when she went down that path and they had that conversation, it was his conscious objective and

desire not to go back to prison, not to have any witnesses, to kill Linda Salinas." RR XXIV, 20. Then during closing argument, the State argued "you can infer from the evidence that he's the actual killer." *Id.*, 43.

2. The State knew that another person present at the scene had placed the murder weapon in the hands of co-defendant Santos Cervantes, not Petitioner.

On June 12, 1996, San Antonio Police Department lead Detective Barry Gresham took two statements from capital murder suspect Seanido Rey. *See* Exhibit 35. This was only one day after the body of Linda Salinas was found in Espada Park in San Antonio. RR XVI, 215-216. In his second statement, Rey admitted he had told Gresham less than the complete truth in his first statement about "what really happened." Exhibit 35. In that second statement, Rey admitted that Linda had gotten into the car with Jason, "Thatie" (later determined to be Juan Gonzales), Petitioner and a person he knew as Santos (later determined to be Santos Cervantes). Linda "was with" Santos, and in fact sat on Santos' lad as the six of them were driving. Santos and Linda were "making out" as they drove. Santos had even taken Linda's bra off as they were driving. Once they reached Espada Park, Santos and Linda walked hand in hand toward the woods and down to the creek. Rey "knew" they were going to have sex. He and the other passengers exited the car and listened to the radio. He never heard any noise coming from the creek. Santos returned to the car ten to fifteen minutes later without Linda. When Rey asked where the girl was, Santos replied "Fuck that bitch, she didn't want to give it up so I stabbed her." Everyone then got back into the car and drove to Santos' friends' house in silence. At the house, Santos told them to be quiet about what happened.

On July 16, 1996, Detective Gresham prepared a "supplementary report" detailing his investigation into the death of Linda Salinas. Exhibit 36. In it he summarized each witness statement taken during the investigation. Seanido Rey's second statement is summarized at pages 17 and 18 of that report. However, Rey's statement that Santos Cervantes had told him that he had stabbed Linda Salinas was summarized as "Santos told him he killed her." *Id.* Clearly, the State was aware that there was some evidence that placed the murder weapon in the hands of Santos Cervantes, and not Petitioner.

3. The State did not disclose that evidence to the defense.

The State has provided this Court with affidavits by both trial prosecutors indicating that Detective Gresham's supplementary report had been disclosed to the defense. *See* Exhibits B and C to Respondent Quarterman's Response in Opposition to Petitioner';s Motion to Stay Proceedings and Hold Them in Abeyance, included here as Exhibits 37 (prosecutor Maria Teresa (Tessa) Herr) and 38 (prosecutor Robert Tylden Shaeffer). Neither affidavit specifically alleges that Seanido Rey's second statement had been disclosed. Mr. Shaeffer's affidavit does claim that co-defendants' statements were routinely disclosed by the State to the defense pursuant to the Bexar County District Attorney's "open file" policy. Exhibit 38.

To be sure, the prosecution is not required "to make a complete and detailed accounting to defense counsel of all investigatory work done." *Blackmon v. Scott*, 22 F.3d 560, 565 (5th Cir. 1994). Nor does the prosecution have a duty to provide the defense with unlimited discovery of

everything it knows. *United States v. Augers*, 427 U.S. 97, 106. (1963). However, the prosecution does have an affirmative duty to disclose exculpatory evidence to the defense. *Brady v. Maryland*, 373 U.S. 83 (1968). "Exculpatory" evidence in this context includes impeachment evidence. *United States v. Bagley*, 473 U.S. 667 (1985). This duty arises without regard to whether or not it was specifically requested. *Banks v. Dretke*, 540 U.S. 668, 690 (2004). It arises with regard to evidence in the possession of the prosecution or of others acting on the prosecution's behalf. *Strickler v. Green*, 527 U.S. 263, 281 (1999), *Kyles v. Whitley*, 514 U.S. 419, 438 (1995). Whether the failure to disclose was intentional or inadvertent is also on no moment. The Supreme Court has held that neither the intent nor good faith of the prosecution will excuse a violation of the duty to disclose exculpatory or impeaching evidence. *Banks v. Dretke*, 540 U.S. at 691.

The State's affidavits in this regard are directly contradicted by affidavits of defense trial counsel Mr. Mario Trevino (first chair) and Mr. Gus Wilcox (second chair).[6] Exhibits 39 and 40. Both defense counsel denying having seen Detective Gresham's supplemental report. Further, while Mr. Shaeffer's affidavit at Exhibit 38 indicates that he had recently spoken with Mr. Mario Trevino, who now recalls having seen Detective Gresham's supplemental report, Mr. Trevino subsequently provided an affidavit indicting that Mr. Shaeffer's statement was taken out of context, and reiterating that he does not recall having seen either that supplemental report or Seanido Rey's June 12 1996 statement before trial. *See* Exhibit 41. In addition, Mr. Wilcox provided an affidavit specifically addressing Seanido Rey's statement. Exhibit 42. He specifically denies having ever seen that statement. *Id.* He also directly contradicts Mr. Shaeffer's claim that the Bexar County District Attorney's "open file" policy extended to the files of co-defendants. *Id.* There was nothing elicited by either the State or the defense at either the guilt-innocence or punishment phases of Petitioner's trial that would indicate that anyone was aware of any evidence that would place the murder weapon in the hands of someone other than the Petitioner. Indeed, the State's argument at both guilt-innocence and punishment was predicated on showing that Petitioner was "the actual killer."

4. That suppressed evidence was favorable and material to the defense.

Evidence is material in this context when there exists a "reasonable probability" that had the evidence been disclosed at trial, the result would have been different. *Banks v. Dretke*, 540 U.S. 668, 698-99 (2004). This reasonable probability does not require that the suppressed evidence would have led to an acquittal. *Kyles v. Whitley*, 514 U.S. at 434. Rather, a reasonable probability of a different result is shown when the failure to disclose evidence "undermines confidence in the outcome of the trial." *Id.* at 434 (quoting *United States v. Bagley*, 473 U.S. at 678). Finally, it must be noted that once it is established that material evidence was suppressed, harmless error analysis has no application. *Kyles v. Whitley*, 514 U.S. at 436-37.

The suppressed evidence was clearly favorable to the defense. It was directly counter to the States's primary theory that Petitioner was the actual killer. It countered the State's argument at punishment regarding Petitioner's intent. Had it been known to the defense, it would have made a difference in the presentation of the defense case. Mr. Wilcox's affidavit regarding the statement

[6] Unfortunately, Mr. Wilcox passed away in March 2008.

of Seanido Rey addresses specific actions he would have taken had he been aware of that statement. Exhibit 42. He would have used the information in cross examination of Detective Gresham. *Id.* He would have used the information to discredit the testimony of Juan Gonzales - the only witness who put the murder weapon in the hands of Petitioner Carlos Trevino. *Id.* Perhaps most significantly, it would have given credence to a defense theory of a spontaneous independent action by Santos Cervantes, contrary to the State's theory of parties involving Petitioner. *Id.*

The key evidence presented and relied upon by the State at Petitioner's trial - in both the guilt-innocence and punishment phases - to place the murder weapon in Petitioner's hands was the testimony of Juan Gonzales. That testimony did so only indirectly, through inference from statements attributed to Petitioner. The suppressed evidence would have not only have provided a direct link between Santos Cervantes and the murder weapon at the scene, but would also have linked to Juan Gonzales' testimony about Cervantes admitting to having broken and discarded the knife two days after the murder, and why Gonzales asked Santos, and not Petitioner, why he killed the girl. Had the defense been aware of that evidence, it would have undoubtedly made that connection for the jury.

The State may argue that there was still the testimony from the fiber expert and the DNA expert regarding the evidence found on Linda Salinas' panties found at the scene - that the statement of Seanido Rey did not conflict with any of that evidence. The problem with that argument is that Seanido Rey's suppressed statement provided that glue that permitted a very credible defense theory, both at guilt-innocence and punishment. The fiber evidence was shown only to be a commonly found fiber similar to those from Petitioner's trousers, and not necessarily derived from Petitioner's trousers. In the face of a credible "other sole actor" defense, this evidence is much less damning. The DNA evidence established a probability of 1 in approximately 11,000 that the blood evidence was from Petitioner - not a very strong link in terms of DNA testing. It is also significant to note that after two DNA tests, neither Santos Cervantes not Petitioner were eliminated. The State's witness admitted that, while Cervantes was eliminated after a third test, there was a fourth test that could have been performed that may have eliminated Petitioner, but that his lab did not have the capability to perform that test. RR XXII, 35. However, even more significant is the testimony by the DNA expert concerning the sperm and seminal fluid findings. Only seminal fluid was found on Linda Salinas panties. No semen was found on the panties. RR XIX, 117. Even more interesting was the testimony that no semen or seminal fluid was found on any of the vaginal, anal, or oral swabs taken from the body of Linda Salinas. RR XXII, 7. Those findings were also consistent with the "Cervantes as sole actor" defense theory that would have been given credibility and advanced b y the defense if it had been aware of the suppressed evidence. *See* Wilcox second affidavit, Exhibit 42.

It is also troubling that the State appears to have engaged in a pattern of suppression or late disclosure of significant, material evidence. Whether this pattern was intentional, negligent, or the result of poor communication among the prosecution team is of no moment. First is the failure to disclose Seanido Rey's second statement, placing the murder weapon in the hands of Santos Cervantes - significant, material evidence. Then there is the late disclosure of the DNA evidence. The defense had been assured that there were no DNA test results linking Petitioner to the murder until very late in the jury selection process. After an alternate juror was seated, the State advised

defense counsel that DNA analysis would be used against Petitioner and that the results, which did not exclude Petitioner as a blood donor, would incriminate him. RR XV, 33-34. The defense asked for a mistrial on the basis of being denied the opportunity to voir dire on DNA. RR XV, 33. That motion was denied, but the Court did agree to appoint an expert to assist the defense in responding to that evidence at trial. RR XV, 35. As noted above, had the defense been aware of that evidence, and obtained their expert assistance before trial, it would also have been aware that no semen or seminal fluid was found on any of the swabs from Linda Salinas' body, and that no semen had been found on her panties. This situation was consistent with the story of a violent attack, but incomplete sexual assault, by Cervantes as presented in the suppressed statement of Seanido Rey. Had the defense been aware of all this evidence before trial, it may have been able to challenge the validity of the test results of the State's witness, or even have a retest performed to directly counter that testimony. However, such opportunities were denied the defense by the suppression of Rey's statement by the State.

Finally, and most disturbingly, there is the late disclosure of the critical incriminating statements attributed to Petitioner by Juan Gonzales. The defense contended that it was not made aware of this evidence until just before Gonzales testified. There was a very heated discussion, outside the hearing of the jury, about whether Gonzales' statement containing that evidence had been disclosed to the defense, pursuant to the District Attorney's "open file policy," before trial. RR XVIII, 154-165. Both defense counsel adamantly argued that they would certainly have recalled such incriminating evidence had it been disclosed, and that they had not been aware of it before trial. *Id.* Again, had Seanido Rey's statement concerning Santos Cervantes been disclosed, the defense would have been in a much better position to respond to this late disclosure to cross examine Gonzales, especially with regard to Cervantes statements about breaking and discarding the knife.

The suppressed evidence would have made a critical and credible defensive response addressing all the significant evidence possible. The failure to disclose it certainly undermines the confidence in the outcome of the guilt-innocence phase of Petitioner's trial. It even more clearly undermines the confidence in the outcome of the punishment phase of the trial. This writ should be granted, and the matter returned to the trial court for a new trial.

ARGUMENT: CLAIM II

DEFENSE COUNSEL RENDERED INEFFECTIVE ASSISTANCE TO PETITIONER CARLOS TREVINO IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BY FAILING TO EFFECTIVELY USE THE INFORMATION PRESENT IN THE STATEMENT OF A CO-DEFENDANT IDENTIFYING A THIRD CO-DEFENDANT AS ADMITTING TO KILLING LINDA SALINAS

A. The Standard on Review

The constitutional standard for determining whether a criminal defendant has been denied the effective assistance of trial counsel, as guaranteed by the Sixth Amendment, was announced by the Supreme Court in *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80

L.Ed.2d 674 (1984):

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

To satisfy the first prong of *Strickland,* i.e., establish that his counsel's performance was constitutionally deficient, a convicted defendant must show that counsel's representation "fell below an objective standard of reasonableness." *Wiggins v. Smith*, 539 U.S. 510, 521, 123 S.Ct. 2527, 2535, 156 L.Ed.2d 471 (2003); *Williams v. Taylor,* 529 U.S. 362, 390-91, 120 S.Ct. 1495, 1511, 146 L.Ed.2d 389 (2000). In so doing, a convicted defendant must carry the burden of proof and overcome a strong presumption that the conduct of his trial counsel falls within a wide range of reasonable professional assistance. *Strickland v. Washington,* 466 U.S. at 687-91, 104 S.Ct. at 2064-66. Courts are extremely deferential in scrutinizing the performance of counsel and make every effort to eliminate the distorting effects of hindsight. *See Wiggins v. Smith,* 539 U.S. at 523, 123 S.Ct. at 2536 (holding the proper analysis under the first prong of *Strickland* is an objective review of the reasonableness of counsel's performance under prevailing professional norms which includes a context-dependent consideration of the challenged conduct as seen from the perspective of said counsel at the time). It is strongly presumed counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Strickland v. Washington,* 466 U.S. at 690, 104 S.Ct. at 2066.

To satisfy the "prejudice" prong, a convicted defendant must establish a reasonable probability that, but for the objectively unreasonable misconduct of his counsel, the result of the proceeding would have been different. *Wiggins v. Smith,* 539 U.S. at 534, 123 S.Ct. at 2542; *Strickland v. Washington,* 466 U.S. at 694, 104 S.Ct. at 2068. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceeding. *Id.* In evaluating prejudice, a federal habeas court must re-weigh the evidence in aggravation against the totality of available mitigating evidence. *Wiggins v. Smith,* 539 U.S. at 534, 123 S.Ct. at 2542.

In evaluating petitioner's complaints about the performance of his counsel under the AEDPA, the issue before this Court is whether the Texas Court of Criminal Appeals could reasonably have concluded petitioner's complaints about his trial counsel's performance failed to satisfy either prong of the *Strickland* analysis. *Schaetzle v. Cockrell,* 343 F.3d 440, 444 (5th Cir.2003), *cert. denied,* 540 U.S. 1154, 124 S.Ct. 1156, 157 L.Ed.2d 1050 (2004). In making this determination, this Court must consider the underlying *Strickland* standard. *Id.* In those instances in which the state courts failed to adjudicate either prong of the *Strickland* test, this Court's review of the un-adjudicated prong is *de novo. See Rompilla v. Beard,* 545 U.S. 374, 390, 125 S.Ct. 2456, 2467 (2005) (holding de *novo* review of the prejudice prong of *Strickland* was required where the state courts rested their rejection of an ineffective assistance claim on the deficient performance prong and never addressed

the issue of prejudice); *Wiggins v. Smith,* 539 U.S. at 534, 123 S.Ct. at 2542 (holding the same).

B. Argument

This claim involves the discovery and use of the second statement of Seanido Rey, Exhibit 35. It is presented for consideration in the event the habeas court finds that defense trial counsel did have notice of that statement, either directly or by review of the supplemental report prepared by Detective Barry Gresham. Exhibit 36. It is presented without waiving any portion of Petitioner's Claim I. The Habeas Court is referred to the discussion in the Argument section of Claim I *supra*, which , for brevity's sake, is incorporated by reference but will not be repeated.here.

1. Trial counsel was deficient in failing to act upon the information found in the second statement of Seanido Rey

There was no evidence presented at trial that directly placed the murder weapon in the hands of Petitioner. The strongest evidence leading to that inference was the testimony of unindicted co-defendant Juan Gonzales. That testimony was heavily relied upon by the State in its argument at guilt-innocence that Petitioner Carlos Trevino was the actual killer of Linda Salinas, and that he was culpable for her death under Texas party liability laws. That testimony was heavily relied upon by the State in its argument that Petitioner Carlos Trevino deserved the death penalty.

However, in his second statement, Seanido Rey provided information indicating that Santos Cervantes had admitted stabbing Linda Salinas because she "wouldn't give it up." Exhibit 35. This gave at least initial credence to a defensive theory that another person, acting alone, was responsible for the death of Linda Salinas. Further development of that theory would have shown that the testimony of Gonzales indicating that Cervantes had admitted breaking and discarding the knife two days after the murder, was consistent with such a defense theory. The absence of spermatozoa or seminal fluid on any of the vaginal, anal, or oral swabs taken from the body of Linda Salinas was also consistent with an attempted, but incomplete, sexual assault as described by Santos Cervantes. None of these consistencies were presented at trial by defense counsel. None of the information from Seandio Rey's second statement was used to cross examine Detective Gresham regarding his investigation. None of the information was used to challenge the testimony of Juan Gonzales. None of the information was used in cross examination of the State's serology expert. No credible defense theory identifying another person as the sole assailant and murderer of Linda Salinas was presented by defense counsel. Trial counsel's performance in failing to advance such a theory or present such cross examinations based on the information in Seandio Rey's second statement was clearly deficient.

2. Trial counsel's deficient performance prejudiced Petitioner at both the guilt-innocence and punishment phases of trial.

The standard for determining the prejudice prong of *Strickland* is identical to the standard for determining the materiality standard under *Brady*. *See Banks v. Dretke*, 540 U.S. 668, 698-99 (2004). For the reasons as discussed in Claim I *supra*, had Petitioner's trial counsel acted on the information of Seanido Rey's second statement, and presented a cohesive defense theory that Santos Cervantes had acted alone in the murder of Linda Salinas, there is a reasonable probability that the outcome at the guilt-innocence phase of the trial would have been different.

The State relied on the same key evidence at the punishment phase of the trial to argue that the jury should resolve the special issues in a manner that would support a sentence of death. The argument again was that Petitioner was "the actual killer." It argued that his actions, as depicted by that same evidence and his criminal history, rendered Petitioner a future danger to the community. It argued that same evidence showed his intent to cause the death of Linda Salinas. Again, for the reasons as discussed in Claim I *supra*, had Petitioner's trial counsel acted on the information of Seanido Rey's second statement, and presented a cohesive defense theory that Santos Cervantes had acted alone in the murder of Linda Salinas, there is a reasonable probability that the outcome at the punishment phase of the trial would have been different.

This writ should be granted, and the matter returned to the trial court for a new trial.

ARGUMENT: CLAIM III

DEFENSE COUNSEL'S FAILURE TO INVESTIGATE AND PRESENT COMPELLING MITIGATING EVIDENCE AT THE PUNISHMENT PHASE DEPRIVED CARLOS TREVIÑO OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

The ultimate question of effective assistance of counsel is a mixed question of law and fact that is reviewed on a de novo review. *Felder v. Johnson*, 180 F.3d 206, 214 (5th Cir. 1999). The legal principles governing the claims for ineffective assistance of counsel were established in *Stickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Ineffective assistance of counsel is comprised of two components: (1) the Petitioner mush show counsel's performance was deficient and (2) the deficiency prejudiced the defense. 466 U.S. at 687, 104 S.Ct. 2052.

The *Strickland* Court required a party prove trial counsel's performance failed to meet generally accepted standards of competence and that there is a reasonable probability the outcome of the case was affected by counsel's deficient performance. Under such, "counsel is strongly presumed to have rendered adequate assistance and to have made all significant decisions in the exercise of reasonable professional judgment." 466 U.S. at 690, 104 S.Ct. 2052.

A. Petitioner's Trial Counsel's Refusal to Initiate Any Form Of An Investigation, His Continuous Refusal To Have Any Meaningful Conversations With His Client And His Failure To Provide Reasonable Information and Consequences Associated With A Plea Offer By The State Are Blaring Examples Of Trial Counsel's Deficient Performance.

To effectively establish *Strickland*'s first prong, deficient performance, a petitioner must demonstrate that counsel's performance "fell below an objective standard of reasonableness." 466 U.S. at 688, 104 S.Ct. 2052. The Supreme Court has continually refused to specifically articulate guidelines for appropriate attorney conduct and have instead opted for a more subjective test: "the proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id.*

1. Trial attorney Treviño's continuous refusal to ever initiate *any* type of an investigation into potential avenues of mitigation was clearly unreasonable.

Carlos Treviño's trial counsel wholly failed to meet the prevailing professional norms under any standard of reasonableness. Trial counsel has an obligation "to conduct a thorough investigation of a defendant's background" and thus, defense counsel's failure to investigate the basis of his client's mitigation defense can clearly rise to a level of ineffective assistance of counsel. *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). While there is a broad range of professionally competent conduct in any case, courts generally require investigations regarding the accused's background and character, at a minimum. *Miniel v. Cockrell*, 339 F.3d 331, 341 (5th Cir. 2003). In fact, the Court most recently instructed that "we focus on whether the investigation supporting counsel's decision not to introduce mitigating evidence of [the defendant's] background was itself reasonable." *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 2537 156 L.Ed.2d 471 (2003), *Williams v. Taylor*, 529 U.S. at 396.

The *Strickland* Court held each case must be analyzed on a case by case basis, viewing such as of the time of counsel's conduct. Although no specific standards are required, the Court opined:

> counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

466 U.S. at 691, 104 S.Ct. at 2052.

Importantly, an attorney's decision to limit an investigation *must* "flow from an informed judgment." (emphasis added) *Baxter v. Thomas*, 45 F.3d 1501, 1514 (11th Cir. 1995). An attorney must investigate different options and make reasonable choices from such. The deference required by *Strickland* does not include decisions that are "uninformed by an adequate investigation into the controlling facts and law." *United States v. Drones*, 218 F.3d 496, 500 (5th Cir. 2000). An essential part of either phase of the criminal defense, is a "substantial, independent investigation into the circumstances and the law from which potential defenses may be derived." *Baldwin v. Maggio*, 704 F.2d 1325, 132-33 (5th Cir. 1983).

In the present case, counsel's failure to uncover and present mitigating evidence cannot be justified as a tactical decision to focus on other aspects of Carlos' case because counsel completely

failed to fulfill "their obligation to conduct a thorough investigation of the defendant's background." *Wiggins*, 539 U.S. 522 (citing *Williams v. Taylor*, 529 U.S. at 396), *see also* 1989 American Bar Association Guidelines for the Appointment and Performance of Counsel on Death Penalty Cases (hereinafter 1989 ABA Guidelines), attached hereto as Exhibit 20. The ultimate question is not whether trial counsel should have presented a mitigation case; but instead, the issue is "whether the investigation supporting counsel's decision not to introduce mitigating evidence of [Petitioner]'s background *was itself unreasonable*." *Wiggins*, 539 U.S. 523 (emphasis in original).

Petitioner acknowledges allegation of failure to investigate on part of counsel, mandates Petitioner to allege with specificity "what the investigation would have revealed and how it would have altered the outcome of the trial." *United States v. Green*, 882 F.2d 999, 1003 (5th Cir. 1989); *Lockett v. Anderson*, 230 F.3d 695, 714 (5th Cir. 2000) (counsel's failure to investigate was deficient; it was not an exercise of informed strategic choice).

a. Failure to comply with the ABA Guidelines

The *Wiggins* Court further stressed defense counsel's investigations "should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." *Wiggins*, 539 U.S. 524 (quoting ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C), at 93, 1989) (emphasis in original). When evaluating the ABA Guidelines, the Court noted certain topics should be considered for presentation, including "medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience and religious and cultural influences." *Id.* at 524. The *Wiggins* Court's reliance on the ABA Guidelines for capital defense harkens back to the *Strickland* decision wherein the Court set them as "guides to determining what is reasonable. *Id.*, *Strickland*, 466 U.S. at 688, 104 S.Ct. 2052.

Petitioner's counsel failed to uncover substantial important mitigation evidence regarding his family and social history. In the instant case, similar observations can be made with regard to the ABA Guidelines which the Supreme Court concluded should have guided trial counsel's investigation and clearly did not do so. These standards clearly underscore the importance of defense counsel's mitigation investigation, but also the potential for strategy shifts between penalty and guilt phases of a capital trial, constitutionally and procedurally different than other criminal cases. 1989 ABA Guidelines 11.8.1 at 123.

Furthermore, the ABA Guidelines set forth specific standards for conducting an investigation into those individuals who might present testimony at the penalty phase. In such, trial counsel is required to seek out witnesses who are "familiar with aspects of the client's life history that might affect . . . possible mitigating reasons for the offense(s), and/or mitigating evidence to show why the client should not be sentenced to death." 1989 ABA Guidelines 11.4.1 (D)(3)(B) at 95.

Additionally, the guidelines extend beyond lay witnesses and specifically address the issue of expert witnesses in preparation of the penalty phase suggesting counsel should consider retaining "[e]xpert witnesses to provide medical, psychological, sociological or other explanations for the offense(s) for which the client is being sentenced, to give a favorable opinion as to the client's

capacity for rehabilitation, etc. and/or to rebut expert testimony presented by the prosecutor." 1989 ABA Guidelines 11.8.3 (F)(2) at 129.

b. Attorney Treviño halted the investigation before it ever began and before speaking to a single witness

Clearly, Treviño's trial counsel's decision not to pursue mitigation was made on a prematurely truncated investigation. Neither trial counsel nor their investigator talked to ***any*** witnesses. They were presented with leads as to how to find individuals, but failed to follow up and delve into potential issues of mitigation. Counsel's conduct simply fell below and norms of reasonableness.

Assessing the reasonableness of an attorney's investigation requires consideration of "not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins*, 539 at 527. Even assuming Treviño's trial counsel limited their scope for strategic reasons, neither *Strickland*, nor *Wiggins* support such a "cursory" investigation. An attorney cannot simply claim "tactical decision" and halt the review. "Rather a reviewing court must consider the reasonableness of the investigation said to support that strategy." *Id.*

This investigation is exactly like that described in *Wiggins*, an investigation of Carlos' background after "having acquired only rudimentary knowledge of his history from a narrow set of sources." *Id.* at 524. Just as the *Wiggins* Court found, Carlos' trial counsel elected to abandon his "investigation at an unreasonable juncture, making a fully informed decision with respect to sentencing strategy impossible." *Id.* at 527-28.

c. A plethora of information was available to Attorney Treviño upon the most rudimentary of investigations.

Petitioner's trial counsel's failure to mount a reasonable investigation prevented important information from being presented to the jury.

(1) Petitioner's previous involvement in the juvenile system would have revealed issues resolved and unresolved from his childhood. A reasonably effective defense counsel would have pursued the information.

(2) Petitioner's ongoing changes at school, his testing and issues with other students would have allowed for a better understanding of Petitioner's actions. A reasonably effective defense counsel would have pursued the information.

(3) A review of Petitioner's background and talking to a few key individuals in his life, would have plainly suggested the need to investigate Petitioner's psychological problems. He did not, to any degree, pursue the information. Ample evidence of childhood trauma at home that should have been pursued, head injuries, black-outs, delusional stories, family troubles, drug and/or alcohol addiction put trial counsel on notice of mental and psychological issues that should have been

investigated.

A rudimentary investigation into any aspect of Carlos' background would have revealed an iceberg tip, which if pursued, would have revealed that Carlos had suffered a lifetime of adversity, disadvantage and disability. Any inquiry into Carlos' school records reveals a child repeating two (2) elementary grade levels, his attendance was poor at best; and his formal education ended during the ninth grade. Surely, this should have prompted further inquiry, which would have led counsel to Carlos' close family and friends.

Although *Strickland* does not require trial counsel to investigate every conceivable line of mitigating evidence no matter how unlikely, clearly in this case, trial counsel's performance was deficient under the first prong of the *Strickland* test. Mario Treviño's strategic choices were made after a "less than complete" investigation and are not supported by any reasonable professional norms. His investigation did not reflect reasonable professional judgment and is wholly inconsistent with the ABA Guidelines with which trial counsel should have been familiar.

2. A total breakdown of communication between Petitioner Treviño and his trial attorney not only prevented any meaningful discussion toward assisting in his defense but also affected essential discussion with regard to plea offers made by the State of Texas.

Meaningful discussion with one's client is a cornerstone of effective assistance of counsel. Clark v. Johnson, 227 L.Ed.2d. 273, *cert. denied* 121 531 U.S. 1167, S.Ct. 1129, 148 L.Ed.2d 995.

Texas courts have found ineffectiveness of counsel is established in circumstances where counsel fails to communicate a plea bargain offer and the defendant states he would have accepted the plea bargain offer if he had been informed of it. *See Ex Parte Lemke*, 13 S.W.3d 791, 796 (Tex. Crim. App. 2000) (Defendants not informed of a plea offer by their attorneys are generally viewed as prejudiced by the missed opportunity to accept an offer and present it to the court for consideration in sentencing); *Paz v. State*, 28 S.W.3d 674, 676.

Merely conveying the plea offers to a defendant is not sufficient. Trial counsel bears an affirmative duty to convey reasonable information about the plea offer, its possible consequences and the legal alternatives so as to allow a defendant the opportunity to make an informed decision as to whether or not to accept the plea offer. *See Von Moltke v. Gillies*, 332 U.S. 708, 721 (1948) ("Prior to trial an accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings and laws involved and then to offer his informed opinion as to what plea should be entered."); *United States v. Barnes*, 83 F.3d 934-40 (7th Cir. 1996) ("It is deficient performance for an attorney to fail to provide good-faith advice about the sentencing consequences of a guilty plea ... If this deficiency proves to be a decisive factor in a defendant's decision ... the defendant has lost the full benefit of his Sixth Amendment rights."); *Teague v. Scott*, 60 F.3d 1167, 1170 (5th Cir. 1995) ("In determining whether or not to plead guilty, the defendant should be made aware of the relevant circumstances and likely consequences so that he can make an intelligent choice."); *United States v. Day*, 969 F.2d 39, 43 (3d Cir. 1992) ("[A] defendant has the right to make a reasonably informed decision whether to accept a plea offer."); *Beckham v. Wainwright*, 639 F.2d 262, 267 (5th Cir. 1981) (where issue is whether to accept plea bargain or not,

"the attorney has the duty to advise the defendant of the available options and possible consequences.")

In the case at hand, trial counsel did not explain the plea bargain accurately and thoroughly. Attorney Treviño discussed the initial plea offer with Carlos. The offer included a plea of life imprisonment in the Texas Department of Criminal Justice with eligibility for parole after thirty (30) years and required Carlos to testify against his co-defendants. That plea was rejected by Carlos, in major part due to the requirement to testify.

The State subsequently removed the requirement for Carlos to act as a cooperating witness and Petitioner Treviño indicated his willingness to accept the plea bargain. Yet, during the conference to sign the proposed plea bargain papers, the documents indicated parole eligibility would not occur until forty (40) years expired. The fact Carlos and his attorney had met only twice previously only added to the mounting commotion. Petitioner felt not only confused, but betrayed by his attorney and withdrew his plea bargain and proceeded to trial. *See* Affidavit Carlos Treviño, Exhibit 16.

In total exasperation, trial counsel simply wiped his hands of the process. Trial counsel never attempted to explain to Petitioner the reasons why he should accept this offer. Trial counsel never consulted with Carlos' family to provide guidance and assistance to Carlos as he attempted to make a life and death decision, literally. In the midst of all the confusion, trial counsel never pushed Carlos to understand a life sentence would enable Carlos to see his family, his wife and his children and to be a part of their lives. *See* Affidavit Carlos Treviño, Exhibit 16. To the contrary, upon Carlos' hesitation and confusion, attorney Treviño gave up on Carlos and any opportunity Carlos had for fair and reasonable representation during his legal escapades.

B. Trial Counsel's Refusal To Mount An Investigation Resulted In His Failure To Present Evidence That Would Have Reasonably Assisted Jurors And Therefore Prejudiced Petitioner's Mitigation Claim During the Punishment Phase Of The Trial.

Establishing a Sixth Amendment violation for ineffective assistance of counsel requires evidence under *Strickland*'s "prejudice" prong.' A defendant "must show that there is a reasonable probability that, but-for counsel's professional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." 466 U.S. at 694, 104 S.Ct. at 2052. Furthermore, in assessing prejudice, "we reweigh the evidence in aggravation against the totality of available mitigating evidence." *Wiggins*, 539 U.S. at 534. Without doubt, trial counsel's performance prejudiced Petitioner's mitigation claim during the punishment phase of the trial.

Trial counsel's investigation simply did not produce mitigation of the same quantity or quality as what actually existed and what was later introduced at the post-conviction evidentiary hearing. Clearly, Treviño's trial counsel's knowledge of available mitigation was insufficient to make an informed strategic choice on these matters. Without having uncovered the information regarding Treviño's troubled background, his strategic choices were clearly made after less than a complete investigation. As previously stated, his actions cannot be seen as "reasonable professional

judgments" supporting trial counsel's limited investigation. *See Wiggins*, 539 U.S. at 533.

The critical question asked of the jury, Special Issue Number Three, was:

> Taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, do you find that there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed?

Mario Treviño failed to provide just about anything for the jury to consider. Had a minimal investigation been performed into Carlos' background, the jury would have learned of a difficult life, with many physical and emotional obstacles.

1. The sole witness presented by the defense was interviewed for the first time only hours before the presentation.

The only testimony the jury heard on behalf of Carlos came from ***the sole defense witness*** in the entire case, Juanita Treviño DeLeon. Ironically, attorney Treviño met Ms. DeLeon ***for the first time*** in the cafeteria located in the basement of the Bexar County Courthouse during the lunch-break on the afternoon in which she testified. Affidavit of Juanita Treviño DeLeon, *see* exhibit 19. Ms. DeLeon's entire testimony comprises five (5) pages in the record. (RR, XXXIII, pp. 135-140), attached as Exhibit 21.

Moreover, during the penalty phase of the trial, the State presented evidence via ten (10) witnesses. In an unbelievable position, trial counsel ***did not ask a single question*** of six (6) of these witnesses. Not one question. Even more incredible, the questioning on the remaining four (4) witnesses was limited, at best. Trial counsel not only failed to mount a case with regard to punishment, but failed to make even the most rudimentary effort at defending against the State's presentation.

2. The most rudimentary investigation would have exposed an abundance of information upon which trial counsel could have mounted a reasonable argument for mitigating circumstances.

The simplest investigation by Attorenys Treviño, Wilcox, or investigator Villanueva would have revealed the exact history about which the courts are concerned. Carlos' mother drank heavily throughout his pregnancy and she experienced significant physical abuse from her father during the pregnancy. Carlos weighed only four pounds at birth and remained in the neonatal intensive care unit for several weeks. During this time, his mother continued to drink heavily and visited her son only a few times. At the age of two, Carlos fell out of a moving car when the passenger door which he was standing and leaning against, suddenly opened without warning. Although he was visibly bruised, Carlos' mother did not seek medical attention for him. A similar incident occurred when Carlos was four and was witnessed by a police officer. She assured the officer she would take him for medical treatment, but once again, Carlos did not receive any. When Carlos was six years old,

he fell and hit his head on a piano. He suffered a spontaneous nosebleed and has experienced spontaneous nosebleeds since that time. Finally, at the age of nine, Carlos was hit by a vehicle while crossing the street. He was knocked unconscious, treated and released. *See* Affidavit of Ann Matthews and accompanying report, attached as Exhibit 22.

From a very early age, Carlos faced adversity in his personal and family life. At five years old, Carlos' younger sister died from Sudden Infant Death Syndrome. He never recovered from this trauma. Furthermore, violence was present in Carlos' life from very early in his childhood. His mother's cousin, as well as a neighbor friend, were stabbed and killed when he was young. Carlos remembers inspecting the blood in the backseat of the car.

Carlos' mother described herself as emotionally unable to care for herself or her children. She continued to drink heavily and Carlos and his siblings were exposed to drug use by his mother, stepfather and other family members at a very early age. By age eleven (11), Carlos was using marijuana, alcohol and cigarettes. When Carlos was ten (10) years old, his mother took him and two younger siblings and they proceeded to move from one relative's house to another. When their relatives would no longer care for them, they lived on the streets. During this time, Carlos' mother drank heavily and was often physically abusive to her children. By the age of twelve (12), Carlos was involved in street crimes, including stealing and minor violence.

Carlos dropped out of school during the 9th grade. "[K]ids made fun of me, my clothes, my shoes and we were always dirty." He had a difficult time with his academic performance, but was never placed in special education programs. *See* Affidavit of Josephine Treviño and Report of Dr. Rebecca A. Dyer, Ph.D., attached as Exhibits 23 and 24, respectively.

In October of 1992, Carlos Treviño, Jr. was born. Carlos admits his alcohol and drug abuse caused his relationship with Juanita Cantu, the mother of his child, to deteriorate. In late 1993, he was arrested for Driving While Intoxicated, Evading Arrest and Unauthorized Use of a Motor Vehicle for which he was sentenced to six (6) months in prison. While in prison, his wife left him. It was during this prison sentence that Carlos became involved in the prison gang known as the "Pistoleros Latinos." Carlos felt it was just expected that he join a gang in prison, so he did. Although Carlos vowed to stay clean upon his release from prison, after only three (3) weeks, he was drinking and smoking marijuana. A short time later, his cousin convinced him to attend to the party that ultimately led to the events of the question. *See* Dr. Dyer's Report, Exhibit 24.

Had trial counsel requested the mitigation expert he acknowledges he should have requested; he would have learned a great amount of information. *Cf. Bell v. Cone*, 535 U.S.685, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002) (trial counsel's guilt theory of not guilty by reason of insanity allowed counsel to put before the jury compelling mitigating witnesses of drug dependency and effects of Vietnam). He even acknowledged that he "should have gotten mitigation expert [sic] to do a psycho-social history of Carlos' life." See Affidavit of Mario Trevino, attached as Exhibit 15. After an extensive evaluation, Clinical and Forensic Psychologist Dr. Rebecca A. Dyer, Ph. D., offered the following:

(1) Carlos presents with characteristics of Fetal Alcohol Affect. Studies have

shown that individuals with significant prenatal exposure to alcohol tend to demonstrate varying degrees of cognitive, academic, attentional and behavioral difficulties throughout childhood and adulthood;

(2) Carlos is functioning within the low average range of intellectual functioning. His verbal, performance and full scale IQ scores are consistent with those found in individuals with Fetal Alcohol Affect;

(3) Carlos shows a history of employing poor problem solving strategies, attention deficits, poor academic functioning, memory difficulties and history of substance abuse, all characteristics consistent with Fetal Alcohol Affect;

(4) Carlos' history of Fetal Alcohol Affect clearly had an impact on his cognitive development, academic performance, social functioning and overall adaptive functioning;

(5) Carlos' history of Fetal Alcohol Affect, along with his history of physical and emotional abuse, physical and emotional neglect, and social deprivation contributed to his inability to made appropriate decisions and choices about his lifestyle, behaviors and actions, his ability to withstand and ignore group influences and his ability to work through and adapt to frustration and anger;

(6) Carlos' background and cognitive abilities would have impacted his decisions to participate in or refrain from any activities that resulted in his capital murder charges;

(7) Carlos' background and cognitive abilities would have impacted his ability to understand and make appropriate decisions about he plea offer presented by his counsel; and

(8) Finally, Carlos' deficits with regard to social awareness and ability to confide and trust in his attorneys were exacerbated by his trial counsel's blatant lack of time spent with his client.

See Exhibit 24.

Additionally, although trial counsel and the investigator were only able to locate one witness, who counsel happened to run into in the Bexar County Courthouse cafeteria immediately prior to her testimony, there were other witnesses available for trial counsel to present during the penalty phase of the trial.

(1) Ms. Janet Cruz, the mother of Carlos' two children, who was then living in San Antonio, Texas. Ms. Cruz recalls that Carlos was a nice and loving father, whom she loved. She recalls that Carlos couldn't ever keep his attention focused on what he was supposed to do, and that he was easily distracted by his friends and people he looked up to. She relates that she didn't like a lot of

Carlos' friends, and he would try to stay away from him. But, according to her recollections, he was very easily influenced by those people, and they frequently talked him into doing the very things he had promised her he wouldn't do anymore. Ms. Cruz didn't understand how Carlos could seem so caring and sincere one minute, and then, hours later, be off doing something that he'd just told her he wouldn't do anymore. *See* Affidavit, attached as Exhibit 25.

(2) Mr. Mario Cantu, an older friend of Carlos, who had (then) known Carlos for over ten years, and was living in San Antonio, Texas, at the time of the trial. Mr. Cantu had spent considerable time around and with Carlos, during his childhood years. Mr. Cantu, today, states Carlos was a follower; and he was with Carlos, and other boys, when Carlos got into trouble for the first time. Mr. Cantu's perception of Carlos is that he was not an instigator, and he was generally a peaceful person. *See* Affidavit, attached as Exhibit 26.

(3) Mr. Ruben Gonzales was one of Carlos' employers. He hired Carlos as a laborer who helped in Mr. Gonzales' roofing business. Mr. Gonzales relates Carlos was a good worker, but was not someone who initiated work, or did things on his own. Mr. Gonzales recalls Carlos could follow instructions and demonstrations of how to do the work, and that he could perform his job duties well, but usually after example. *See* Affidavit, attached as Exhibit 27.

(4) Ms. Jennifer DeLeon is Carlos' sister. She recalls the frequent times when their mother would leave them with friends or relatives, or with no one at all, while she left with first one man, and then another. Ms. DeLeon remembers their mother was usually either drunk, or well on her way to getting that way. She relates their family rarely had any money, and they were always out of, or needing food and clothes. But their mother wasn't working, most of the time, and most of the money she did get, was spent on liquor. Ms. DeLeon also recalls Carlos had difficulty in school, almost from the start. She recalls that he had to repeat a couple of grade-years, because his academic scores weren't high enough for him to pass to the next grade level. And she unequivocally states that none of the attorneys who represented her brother had ever contacted her, until December of 2003. *See* Affidavit, attached as Exhibit 28.

(5) In addition to those personal acquaintances, Carlos' school records were also available for presentation during the mitigation phase of his trial. Those school records reflect during his attendance at seven different schools, he repeated both the 2nd and 3rd grades; the records don't reflect his presence or performance for his 4th &/or 5th grade school years (1986); was socially promoted from 6th to 7th grade; was Placed in the 9th Grade, per Principal Directive, from where he was expelled in the second semester of the school year. *See* Affidavit, attached as Exhibit 29.

(6) His academic performance, including the repeated years, according to those school records was as follows:

Sch. Year	School Grade	Grades	Absences
1980-81	Kindergarten	C+avg	21 of 126 days
1981-82	1st Grade	D avg.	18 of 174 days

1982-83	2nd Grade	D avg.	19 of 175 days
1983-84	2nd Grade (repeated)	D avg.	16 of 175 days
1984-85	3rd Grade	F avg.	6 of 175 days
1985-86	3rd Grade (repeated)	C avg.	3 of 75 days
4th Grade	No Records	No Records	
5th Grade	No Records	No Records	
1987-88	6th Grade	C+ avg.	[No Attendance Records]
1988-89	7th Grade	49.8 avg	[No Attendance Records]
1989-90	8th Grade	54.6 avg.	[No Attendance Records]
1990-91	9th Grade	39.0 avg	[No Attendance Records]; Expelled.

This is not a case where the initial investigation led counsel to believe further investigation would be fruitless or unwarranted. The fact is attorney Treviño simply gave up on Carlos and any opportunity he had at a reasonable defense and mitigation case after the plea negotiations fell apart.

The trial court records themselves reveal Carlos' juvenile records; yet, Carlos' trial counsel did not even take the time to talk to his juvenile probation officers, prior to trial, to determine the extent of his juvenile history. *Cf. Williams v. Taylor*, 529 U.S. 362, 396, 120 S.Ct. 1495, 1514-1515, 146 L.Ed.2d 389 (2000). This limited investigation would have revealed information regarding his mother, his wife and his child. It would have shown Carlos as a responsible probationer and led counsel to his school records. It would have shown where Carlos performed community service and his history of employment. Moreover, the records would have revealed an individual with a life-long relationship with alcohol and the effects therefrom. Trial counsel's failure to investigate Carlos' background demonstrates a complete failure to fulfill their obligation to their client. *Id.*

Had the jury been able to consider Carlos Treviño's mixed up and unexplainable turbulent and chaotic life history on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance. *See Wiggins* 539 U.S. at 536. Multiple witnesses were available to testify regarding Carlos' positive traits. *See* Exhibits 25-28. These affidavits support that Carlos was a loving father, a good worker and a compassionate and caring friend and relative. Moreover, Carlos did not have an exceedingly violent criminal history that would contradict the mitigation evidence. To the contrary, his juvenile history consisted of Driving While Intoxicated, Evading Arrest, Unauthorized Use of a Motor Vehicle and Possession of Marijuana and Burglary. These are non-violent crimes. The only evidence in Carlos Treviño's

juvenile record to suggest any violence was a charge of Unlawful Carrying. There were no allegations this firearm was used against another individual or that it was used in a violent manner. His own probation officer, had she been asked, would have described Carlos as "cooperative" and "remorseful." *See* Affidavit of Lorraine Reagan and Juvenile Records of Carlos Treviño, attached as Exhibits 30 and 31, respectively. These are not crimes upon which most jurors would find "a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society. See Tex. Code Crim. Proc. 37.071 § 2(b). Clearly, the mitigation evidence, taken as a whole, "might well have influenced the jury's appraisal" of Carlos" moral culpability. *Id.* at 538.

Attorney Treviño"s failure to investigate, at any level, rendered him completely unable to make a reasonable argument during the punishment phase of the trial. Because no other witness testimony was available upon which he could argue, Treviño was relegated to arguing Carlos would not be a future danger because he would be locked upon the Texas Department of Criminal Justice. His entire argument is not based upon Carlos as an individual, but upon the fact that he will be in lock down for 23 hours a day. If Carlos' attorney could not see this was a question about Carlos as a person, how could the jury be expected to do so? If Carlos' attorney did not see the importance of Carlos as an individual, how could the jury be expected to do so? RR XXIV, 22-23, attached as Exhibit 23. Treviño's arguments, such as they were, were undermined by co-counsel's rambling and disorganized arguments. See *id.*

Moreover, when the issue of mitigating evidence arose during the closing arguments, Carlos' attorney, was once again left without argument. "His mother couldn't even come up here to talk to you." RR, XXIV, p. 25, lines 17-18. The uncontroverted truth is that his mother did not testify ***because she was never asked.*** *See* Affidavit of Josephine Treviño, Exhibit 23. Worse yet, the investigator assigned to the defense, Edward Villanueva, was told "not to look for them [Carlos' relatives]." See attached Exhibit 33. Once again, Mario Treviño's refusal to ask the necessary questions and make the meekest attempt at investigation allowed the jury to be misled and deny Carlos a reasonable quest at leniency via mitigating evidence. In the words of co-counsel, Mr. Wilcox, "the approach is and the law is to look at his background." RR XXIV, 34, lines 18-19. Trial counsel's failure to act prevented the jury from performing the very task with which they charged the jury.

In closing argument, the State of Texas argued Carlos Treviño has received a "fair trial according to due process and the law of the State of Texas, and of the United States." RR XXIV, 11, lines 6-8. The reality is just the opposite. Attorney Mario Treviño allowed his preconceived opinions about Carlos Treviño to inhibit his representation of his client. His failure to initiate even the simplest investigation prevented the jury from hearing any mitigating testimony. The result being a violation of Carlos Treviño's Sixth Amendment right to effective assistance of counsel.

ARGUMENT: CLAIM IV

THE SUPREME COURT'S RECENT DECISION IN *ATKINS v. VIRGINIA*, ALONG WITH THE EIGHTH AND FOURTEENTH AMENDMENTS, PROHIBITS THE EXECUTION OF CARLOS TREVIÑO, BECAUSE HE

HAS BEEN DIAGNOSED WITH A FETAL ALCOHOL SYNDROME DISORDER.

A. Introduction

Significant prenatal exposure to alcohol can cause devastating, lifelong developmental disabilities in intellectual functioning, adaptive behavior, reasoning, and judgment. Based on the Supreme Court's groundbreaking decision in *Atkins v. Virginia*, 122 S.Ct. 2242 (2002), the Eighth Amendment now prohibits the execution of those persons who suffer from the same kinds of behavioral and cognitive impairments as the mentally retarded. Mr. Treviño has been diagnosed with Fetal Alcohol Effects, a significant disability within the spectrum of fetal alcohol disorders. Accordingly, his execution would violate the Eighth and Fourteenth Amendments.

The Supreme Court in *Atkins* identified two reasons for outlawing the execution of the mentally retarded. First, the Court noted that, "[b]ecause of their disabilities in areas of reasoning, judgment, and control of their impulses, . . . [the mentally retarded] do not act with the level of moral culpability that characterizes the most serious adult criminal conduct." *Id.* at 2242. Second, the Court found that "their impairments can jeopardize the reliability and fairness of capital proceedings against mentally retarded defendants." *Id.*

The Court specifically listed the kinds of impairments that reduce the moral culpability of mentally retarded offenders. The mentally retarded suffer diminished capacities to: (1) understand and process information; (2) communicate; (3) abstract from mistakes and learn from experience; (4) engage in logical reasoning; (5) control impulses; and (6) understand the reactions of others. *Id.* at 2250. The Court explained that:

> There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders. Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.

Id. at 2250-51. Because of these impairments, the *Atkins* Court found that executing the mentally retarded would not advance the retributive and deterrent purposes of capital punishment. *Id.* at 2251.

The second justification *Atkins* espoused for a categorical rule exempting mentally retarded offenders from execution also stemmed from their disabilities. The Court recognized that "the lesser ability of mentally retarded defendants to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors" enhanced the risk that they would be sentenced to death despite evidence that might call for a less severe penalty. *Id.* at 2251-52. The Court explained that:

> Mentally retarded defendants may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an

> unwarranted impression of lack of remorse for their crimes. As *Penry* demonstrated, moreover, reliance on mental retardation as a mitigating factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury.

Id. at 2252.

Although *Atkins* surveyed the legislative landscape to determine whether evolving standards of decency prohibited the execution of the mentally retarded, *Id.* at 2247-50, the Court emphasized that, at bottom, the decision rested with the Court itself. The legislative evidence, the Court recognized, "did not wholly determine the controversy, for the Constitution contemplates that ***in the end our own judgment*** will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment." *Id.* at 2247 (emphasis added, internal quotation marks omitted). By setting out the specific developmental disabilities that characterize the mentally retarded and justifying a ban on their execution, the Court itself established the conditions that provide objective evidence of an evolving standard of decency.

B. Fetal Alcohol Syndrome

A person who is diagnosed with a fetal alcohol syndrome disorder comes within the scope of the evolving standard of decency announced in *Atkins* because such a person shares the same kinds of impairments that the Supreme Court found sufficient to categorically exempt the mentally retarded from execution. Over thirty years' worth of research has shown that significant prenatal alcohol exposure can have an array of disabling effects on the developing fetus. *See generally* Streissguth, FETAL ALCOHOL SYNDROME: A GUIDE FOR FAMILIES AND COMMUNITIES (1999 ed.). Alcohol is a teratogen; "a substance or condition that disrupts typical development in offspring as a result of gestational exposure and causes birth defects." *Id.* at 56-59. A developing fetus exposed to a teratogen can be affected in four distinct ways: death, malformations, growth deficiency, and functional deficits. Not all teratogens can cause all four outcomes; alcohol, however, is a teratogen that does. *Id.* at 56. Public policies to prevent fetal alcohol syndrome disorders began almost as soon as alcohol was clearly identified as a teratogen. In 1981, the Surgeon General recommended that women not drink alcoholic beverages during pregnancy or when planning a pregnancy. In 1989, Congress passed legislation requiring a label on all alcoholic beverage containers sold in the United States warning against drinking alcohol during pregnancy. Streissguth, Barr, Kogan, & Bookstein, Primary and Secondary Disabilities in Fetal Alcohol Syndrome at 27.

Fetal Alcohol Syndrome (FAS) is a fetal alcohol syndrome disorder based on three features: (1) pre- and/or post-natal growth deficiency; (2) a distinct pattern of facial anomalies; and (3) central nervous system damage. A separate diagnosis of Fetal Alcohol Effects (FAE), or Alcohol-Related Neurodevelopmental Disorder, is used to describe those persons who have only partial manifestations of FAS, usually central nervous system damage without the characteristic growth deficiency or facial malformations.

Prenatal exposure to high levels of alcohol has a direct toxic effect on cells and can produce cell death, causing certain areas of the brain to contain fewer cells than normal. FETAL ALCOHOL

SYNDROME 97-100. For example, the corpus callosum, a large fiber tract that connects the two hemispheres of the brain, is significantly smaller in alcohol-exposed children. *See* Mattson & Riley, Neurobehavioral and Neuroanatomical Effects of Heavy Prenatal Exposure to Alcohol, in THE CHALLENGE OF FETAL ALCOHOL SYNDROME: OVERCOMING SECONDARY DISABILITIES (1999 ed.) 10-13. Similar results have been reported in children with attention deficit hyperactivity disorder, an interesting finding given the high prevalence of attention deficits and impaired response inhibition in children with FAS or FAE.

Devastating, lifelong developmental disabilities characterize individuals diagnosed with FAS and FAE. Exposure to as little as one ounce of alcohol per day has been associated with IQ decrements of six to seven points. *Id.* at 6. Children with FAS have full scale IQ scores in the mid-to-high 70s; children with FAE perform only marginally better. FETAL ALCOHOL SYNDROME 102-03. Only 25% of people with FAS and less than 10% of people with FAE have IQ scores less than 70. *Id.* at 103.

In addition to deficits in attention and overall intellectual functioning, other impairments associated with FAS and FAE include impulsivity, lack of inhibition, verbal and arithmetic learning disabilities, memory problems, difficulty learning from experience, poor judgment, disorientation in time and space, perseveration, difficulty abstracting, and developmental delays in language, motor, and social functioning. *See generally* Mattson & Riley, A Review of the Neurobehavioral Deficits in Children with Fetal Alcohol Syndrome or Prenatal Exposure to Alcohol, in 22 ALCOHOLISM: CLINICAL AND EXPERIMENTAL RESEARCH 279-94 (1998); FETAL ALCOHOL SYNDROME 65-67. Measures of adaptive behavior reveal that nearly 60% of individuals with FAS or FAE scored in the significantly maladaptive range. *Id.* at 105. These individuals performed most poorly in socialization and communication skills. They frequently failed to consider the consequences of their actions, lacked appropriate initiative, were unresponsive to subtle social cues, and lacked reciprocal friendships.

The permanent, organic brain damage of people with FAE is "hidden," because it often does not conform to current assistance guidelines for providing services, such as having a low IQ score, a debilitating physical handicap, a serious mental illness, or even the physical facial features of FAS. FETAL ALCOHOL SYNDROME 110. Studies confirm that heavy prenatal exposure to alcohol causes a consistent and pervasive pattern of neuropsychological deficits regardless of whether or not a child exhibits the pattern of physical features associated with FAS. Mattson, Delis, & Jones, Neuropsychological Comparison of Alcohol-Exposed Children With or Without Physical Features of Fetal Alcohol Syndrome, 12 NEUROPSYCHOLOGY 146-153 (1998). Indeed, higher rates of many of the secondary disabilities arising from alcohol"s damaging prenatal effect on the brain and central nervous system were found in people diagnosed with FAE rather than FAS and who had IQ scores above rather than below 70. *Id.* at 111.

C. Carlos Trevino was Constantly Exposed to Alcohol in his Mother's Womb, Resulting in Permanent Cognitive Disabilities

There is no doubt that Carlos Treviño shares the same kinds of permanent cognitive disabilities that mark the mentally retarded. In 2003 and 2004, Dr. Rebecca A. Dyer, a clinical and

forensic psychologist, conducted a comprehensive examination of Carlos and diagnosed him as having FAE. *See* Exhibit 24 (Report of Dr. Dyer). Dr. Dyer reported that Carlos' mother consumed substantial quantities of alcohol throughout her pregnancy. She drank between eighteen (18) and twenty-four (24) twelve-ounce cans of beer every day. At birth, Carlos weighed only four pounds and had to remain in the neonatal intensive care unit for several weeks. His mother continued to drink heavily after his birth as well. *Id.* at 7-8. Based on these facts, along with the results of a battery of psychological tests and a review of documents associated with Treviño's medical, developmental, social, and academic history, Dr. Dyer concluded that FAE had a significant impact on his cognitive, behavioral, and emotional development. *Id.* at 15-18. Dr. Dyer found that Carlos falls within the low average range of intellectual functioning and that his verbal, performance, and full scale IQ scores are consistent with those reported for persons with FAE. Specifically, Dr. Dyer noted that:

> Other characteristics consistent with FAE include a history of employing poor problem-solving strategies, attentional deficits, poor academic functioning, memory difficulties, and history of substance abuse, all characteristics that are present in Mr. Treviño's history and test results. Although many of these characteristics are also consistent with a history of physical abuse, neglect, and other clinical and behavioral disorders, it is important to note that research has indicated that only individuals with FAS/FAE tend to present with long term problems with adaptive functioning, regardless of home background, history of childhood abuse or trauma, social background, or history of clinical and/or behavioral problems. In essence, individuals with histories of significant prenatal exposure to alcohol have been shown to present with deficits in adaptive behavior, poor judgment, attentional deficits, and other cognitive deficits throughout childhood, adolescence and into adulthood, which is not the finding in individuals with other childhood difficulties. In addition, the deficits found in FAS/FAE children tend to become more debilitating as these individuals get older.

Id. at 16.

The impairments Carlos Treviño suffers from due to his FAE are identical to the ones the Supreme Court listed in *Atkins* as justifying a ban on the execution of the mentally retarded. Like the mentally retarded, Mr. Treviño's FAE has left him with diminished capacities to understand and process information, communicate, abstract from mistakes and learn from experience, engage in logical reasoning, control his impulses, and understand the reactions of others. *Cf. Atkins*, 122 S.Ct. at 2250. Like the mentally retarded, Carlos' "disabilities in areas of reasoning, judgment, and control of [his] impulses" have rendered him unable to act "with the level of moral culpability that characterizes the most serious adult criminal conduct." *See Id.* at 2242. Finally, like the mentally retarded, Treviño's impairments "can jeopardize the reliability and fairness of capital proceedings." *See Id.* For these reasons, *Atkins*, along with the Eighth and Fourteenth Amendments, prohibits Carlos Treviño's execution.

ARGUMENT: CLAIM V

THE STATE COURT FAILED TO HOLD AN EVIDENTIARY HEARING WHEN TRIAL COUNSEL, IN A MOTION FOR NEW TRIAL, CLAIMED HE WAS INEFFECTIVE, IN VIOLATION OF PETITIONER'S RIGHT TO DUE PROCESS AND THE SIXTH AMENDMENT.

Statement of Facts Concerning Claim V

After an alternate juror was seated, the State advised defense counsel that DNA analysis would be used against Petitioner and that the results, which did not exclude Petitioner as a blood donor, would incriminate him. [RR XV, 33-34]. Defense counsel asked for a mistrial after being denied the opportunity to voir dire on DNA. [RR XV, 33]. That motion was denied. [RR XV, 35]. Defense counsel agreed to the appointment of an independent expert to analyze the DNA and report back while the trial was in progress. [RR XV, 38]. Defense counsel by his own admission, was unable to properly prepare Petitioner's defense, and he therefore alleged ineffective assistance of counsel in a Motion for a New Trial. [CR Supp., 4]. On July 25, 1997, trial counsel timely filed the Motion for New Trial. [CR Supp., 4-8]. *See* Exhibit 34. Trial Counsel Mario Trevino alleged that Petitioner had received ineffective assistance of counsel and that the trial court erred in denying him a motion for continuance.

Argument and Authorities in Support of Claim V

The right to effective assistance of counsel is guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. Petitioner is entitled to effective assistance of counsel under Article I, § 10 of the Texas Constitution. *State v. Thomas*, 768 S.W.2d 335, 336 (Tex. App. -- Houston [14th Dist.] 1989, 16 pet.). Petitioner was denied effective assistance under both standards.

In *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) the United States Supreme Court formulated a two prong test for determining whether reversal is required for ineffective assistance:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction ..... resulted from a breakdown in adversary process that renders the result unreliable.

Id. at 687. Furthermore, such showings must be made "in light of all the circumstances." *Id* at 690.

Petitioner, due to omission by defense counsel, was denied the proper tools with which to construct a defense. While defense counsel agreed to appointment of an expert, the trial was already underway. [RR V, 15-38]. Indigent defendants are entitled to independent experts when their

assistance "may well be crucial to the defendant's ability to marshal a defense." *Ake v. Oklahoma*, 470 U.S. 68, 71 (1985). In *Ake*, the United States Supreme Court conducted a Fourteenth Amendment Due Process analysis, and held that without independent experts, defendants could be denied "meaningful access to justice." *Id.* at 76-77. While jurors may disregard a defendant's testimony or a lawyer's argument, experts "assist lay jurors, who generally have no training in 'scientific or medical matters,' to make a sensible and educated determination about the contested issues." *Id.*, 470 U.S. at 81. *See also Cowley v. Strickland*, 929 F.2d 640 (9th Cir. 1991); *Kordenbrock v. Scraggy*, 919 F.2d 1091 (6th Cir.) (en banc), *cert. denied*, 499 U.S. 970 (1991); *Smith v. McCormick*, 914 F.2d 1153 (9th Cir. 1990); *Blake v. Kemp,* 758 F.2d 523 (11th Cir.) *cert. denied*, 474 U.S. 998 (1985).

Petitioner was also denied the right to a fair rebuttal. A capital defendant must be given a fair opportunity to meet, rebut or explain any evidence which the state offers as a reason the defendant should be put to death. *Gardner v. Florida*, 430 U.S. 349 (1977). Although defense counsel urged an *Ake* motion and a Motion for Continuance to prepare a defense to the incriminating DNA evidence, he was denied that opportunity. Had the trial court allowed adequate time to prepare a proper defense, the DNA would not have had such a serious impact on the jury. The evidence was used by the State in seeking a finding of guilty. [RR V, 22-98, 107, 143].

The Supreme court of the United States established the test for effective assistance of counsel in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 674 (1984). Under this test, one must show that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Id.* Prejudice means there is a reasonable probability that but for counsel's acts or omissions, the outcome of the proceeding would have been different, and a reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland v. Washington, supra*. An ineffective assistance of counsel claim is a mixed question of law and fact, which is subject to plenary review under the *Strickland* test. *Baxter v. Thomas*, 45 F. 3d 1501, 1512 (11th Cir. 1995).

The Supreme Court of the United States has recently established a materiality standard for a *Brady* claim which is the same showing required to demonstrate the above prejudice prong for counsel's deficient performance. *Kyles v. Whitley*, 514 U.S.419 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). Materiality does not require a defendant to demonstrate by a preponderance of the evidence that the absence of the error would have ultimately resulted in an acquittal or life sentence. *Id.* at 1566-1567. The test is whether the error undermines confidence in the jury's sentence of death or conviction for capital murder. *Id.* at 1566. This is not a sufficiency of the evidence test -- that is, the defendant is not required to demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would have been insufficient evidence remaining to convict or return a sentence of death. *Id.* The reviewing court should view the favorable evidence and determine if it reasonable puts the whole case in such a different light so as to undermine confidence in the verdict. *Id.*; *See Lindsey v. King*, 769 F.2d 1034, 1042 (5th Cir.1985) (suppressed impeachment evidence may have consequences for the case far beyond discrediting the witness testimony.). Materiality must be assessed in terms of the suppressed evidence considered as a whole, not item by item. *Kyles v. Whitley, supra*, 115 S.Ct. at 1567. Prejudice under *Strickland* should be considered in the same manner. *See also Wesley v. Johnson*, 83 F.3d 714, 719 (5th Cir.

1996), *cert. denied*, 519 U.S. 1094, 117 S.Ct. 773, 136 L.Ed.2d 718 (1997) (prejudice analysis should not focus on determination of outcome but on whether error ensures that the result of the proceeding was fundamentally unfair or unreliable); *Lockhart v. Fretwell*, 506 U.S. 364, 371, 113 S.Ct. 838, 122 L.Ed. 180 (1993).

Thorough factual investigation is required for effective representation. *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed 188 (1932). "It is not enough to assume that defense counsel thus precipitated into the case thought that there was no defense, and exercised their best judgment in proceeding to trial without preparation. Neither they nor the court could say what a prompt and thorough-going investigation might disclose as to the facts." *Id.* at 58; *See Strickland v. Washington, supra,* 466 U.S. at 691. "Strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make a reasonable investigation or to make a reasonable decision that makes particular investigations unnecessary." *Strickland v. Washington, supra* 104 S.Ct. at 2066; *see Kimmelman v. Morrison* 477 U.S. 365, 385 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986). Counsel's failure to at least seek out an expert witness in a timely manner is outside the range of competent assistance. *Elledge v. Dugger*, 823 F.2d 1439 (11th Cir. 1987). The Fifth Circuit has discussed counsel's omissions as follows:

> Whether counsel's omission served a strategic purpose is a pivotal point in *Strickland* and its progeny. The crucial distinction between strategic judgment calls and plain omissions have echoed in the judgments of this court. For example, in *Nealy* we found counsel's performance deficient and stressed that at a post-conviction hearing, the defense counsel did not testify that such efforts would have been fruitless, nor did he claim that the decision not to investigate was part of a calculated trial strategy. He simply failed to make the effort. Counsel did not choose strategically or otherwise, to pursue one line of defense over another. Instead [he] simply abdicated his responsibility to advocate his client's cause.

Loyd v. Whitley, 977 F.2d 149, 158-159 (5th Cir. 1992), *cert. denied*, 508 U.S. 911, 113 S.Ct. 2343, 124 l.Ed2d 253 (1993), *citing Nealy v. Cabana*, 764 F.2d 1173, 1178 (5th Cir. 1985).

Failure to interview witnesses or discover readily available evidence is an error in trial preparation, not trial strategy. *Kenley v. Armontrout*, 937 F.2d 1298, 1304 (8th Cir.) *cert. denied sub nom, Delo v. Kenley*, 505 U.S. 964, 112 S.Ct. 431, 116 L.Ed. 450 (1991). Any decision or judgment that flows from lack of diligence in preparation and investigation, therefore, is not protected by the presumption in favor of counsel having acted reasonably. *Id.* "Tactical decisions must be made in the context of a reasonable investigation, not in a vacuum. 'It is not enough to assume that counsel ..... thought there was no defense, and exercised [his] best judgment ...'" *Bouchillon v. Collins*, 907 F.2d 589, 597 (5th Cir. 1990). *Citing Powell v. Alabama, supra.*

In the Motion for New Trial defense counsel alleged:

> A. Defendant was denied effective assistance of counsel during voir dire. The right to be represented by counsel includes counsel's right to question the members

> of the jury panel to intelligently exercise peremptory challenges. Defendant's trial counsel was denied the opportunity to question and discover juror's views on an issue applicable to the case, to wit: scientific evidence/DNA. During the pre-trial hearing, Defendant=s trial counsel was informed by the state that no DNA evidence connecting this defendant to the crime had been found and that there was no DNA evidence to be used in Defendant's trial. After 11 jurors had been accepted by defendant to hear this case, the State informed Defendant's counsel that DNA blood testing conducted on the victim's panties did in fact connect this defendant to the crime.
>
> B. The Court erred in denying defendant's Motion for Continuance. After the jury had been selected, but prior to the jury being sworn, defendant's trial counsel moved for a continuance, based on the facts related above. The trial court denied the Motion for Continuance. Consequently, Defendant was denied effective assistance of counsel because he was forced to proceed to trial without adequate preparation to cross examine the state's expert witness[,] his DNA testing procedure[,] and the results of his DNA testing.

[CR Supp., 4-8].

On July 16, 1997, Petitioner's court appointed investigator, Edward C. Villanueva, conducted interviews of jurors. See Exhibit 33. Mr. Villanueva, in his report and his affidavit, stated that the jurors' opinion of the condemning evidence was the blood, DNA and fiber evidence, coupled with Juan Gonzales' testimony. The jurors believed most of what Gonzales said. It must be concluded that this improperly admitted evidence only served to further prejudice Applicant.

Prejudice is presumed from an inherent conflict when defense counsel files a Motion for New Trial claiming ineffective assistance and the court does not appoint substitute counsel. *United States v. Del Muro*, 87 F.3d 1078 (9th Cir. 1996). In Petitioner's case a post-trial hearing should have been held where trial counsel would have to prove his own ineffectiveness.

These actions and omissions are sufficient to undermine the confidence in the outcome of this case. Petitioner was prejudiced by these acts and omissions. Petitioner did not receive effective assistance of counsel. The trial court should have held an immediate hearing and appointed another attorney. [RRWH 1, 54-55].

ARGUMENT: CLAIM VI

PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL, IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, BECAUSE HIS TRIAL COUNSEL PERFORMED DEFICIENTLY BY FAILING TO EITHER PREVENT OR OBJECT TO DAMAGING, INADMISSIBLE, TESTIMONY, AND THAT DEFICIENT PERFORMANCE PREJUDICED PETITIONER.

Statement of Facts Concerning Claim VI

At the guilt/innocence phase of the trial, witness Juan Gonzales testified that codefendant Santos Cervantes said something about being cool about snapping the complainant's neck, which statement was made after all defendants drove away from the scene of the offense. [RR XIX,5]. Juan Gonzales also testified that Brian Apolinar stated after the sexual assault, "we don't need no witnesses." Petitioner replied, "we'll do what we have to do." [RR XVIII, 190-191]. Juan Gonzales quoted Santos Cervantes saying to Petitioner, "that was cool how you used a knife." Petitioner responded, "I learned how to kill." [RR XIX, 5]. Defense counsel failed to object to this testimony, [RR XIX, 137; RR XIX, 5].

At the punishment phase of the trial, Juan Gonzales again testified:

By The State;

Q: All right. Was there a conversation between the other occupants of the car?
A: Yes, Ma'am.
Q. All right. Could you tell the jury, please, what was said and who said it?
A: That it was cool - Santos said it was neat about Carlos [Petitioner] snapping her neck.
Q. All right. And in response to that, what did Carlos say?
A: "I learned how to kill in prison."
Q: All right. What else did he say about his ability to use a knife?
A: That "I learned how to use a knife in prison, too."

RR XXIII, 83-85].

Argument and Authorities in Support of Claim VI

A failure to object to the testimony at trial waives the complained of error. (Tex. R. App. P.33.1). Even the State, in its reply brief on direct appeal contends that defense counsel's failure to object did not preserve error. [State's reply brief on direct appeal, p. 22 (State's Response to Appellant's Brief)].

Petitioner is entitled to confront the witnesses against him. *Maryland v. Craig*, 497, U.S. 839, 110 S.Ct. 3157, 111 L.Ed. 666 (1990). Any hearsay exception must be supported by indicia of reliability if it is to pass constitutional muster. *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 253, 65 L.Ed.2d 597 (1980). A defendant is deprived of the right of confrontation when hearsay evidence is used in lieu of live testimony with no legal basis for its admissibility. *United States v. Guadian-Salazar*, 824 F.2d 344 (5th Cir. 1987). In Petitioner's case there was no evidence adduced as to the unavailability of the hearsay witness.

Under Texas law, the statement or act of a co-conspirator after the completion of the conspiracy is inadmissible. *Delgado v. State*, 544 S.W.2d 929 (Tex.Crim.App. 1977). The statements, if made, were not made in furtherance of the conspiracy. *Ward v. State*, 657 S.W.2d 133 (Tex.Crim.App. 1983); *Meadow v. State* 812 S.W.2d 330 (Tex.Crim.App. 1983). Statements which

are in furtherance of a conspiracy are made:

> (1) with the intent to induce another to deal with a co-conspirator or in any other way to cooperate with or assist the co-conspirators; (2) with intent to induce another to join the conspiracy; (3) in formulating future strategies of concealment to benefit the conspiracy; (4) with the intent to induce continual involvement in the conspiracy, or: (5) for the purpose of identifying the role of one conspirator to another.

Williams v. State, 815 S.W.2d 745, 746 (Tex.App.--Waco 1991), *rev'd and remanded on other grnds.*; 829 S.W.2d 216 (Tex.Crim.App. 1992), *conviction rev'd.*, 838 S.W.2d 952 (Tex.App.--Waco 1992, *pet. ref'd.*). The statements between Petitioner and Cervantes did not advance the objectives of the conspiracy. Petitioner's trial counsel was ineffective by both failing to move to prevent the presentation of those statements before trial in the form of a Motion in Limine, or by failing to object to their admission at the time they were solicited by the State. It cannot be stated that there is a fair assurance that the statements erroneously admitted into evidence did not contribute to the conviction.

Applicant was also denied the right to a fair rebuttal. A capital defendant must be given a fair opportunity to meet, rebut or explain any evidence which the state offers as a reason defendant should be put to death. *Gardner v. Florida*, 430 U.S. 349 (1977).

The right to effective assistance of counsel is guaranteed by the Sixth Amendment to the United States Constitution, as applied to the States through the Fourteenth Amendment to the United States Constitution. . Applicant was denied effective assistance. In *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 674 (1984) the United States Supreme Court formulated a two prong test for determining whether reversal is required for ineffective assistance:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction ..... resulted from a breakdown in the adversary process that renders the result unreliable.

Id. at 687. Prejudice means there is a reasonable probability that, but for counsel's acts or omissions, the outcome of the proceeding would have been different, and a reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland v. Washington, supra.* An ineffective assistance of counsel claim is a mixed claim of law and fact subject to plenary review under the *Strickland* test. *Baxter v. Thomas*, 45 F.3d 1501, 1512 (11th Cir. 1995). Furthermore, such showings must be made "in light of all the circumstances." *Id.* at 690.

The Supreme Court of the United States has recently established a materiality standard for a *Brady* claim, which is the same showing required to demonstrate the above prejudice from counsel's deficient performance. *Kyles v. Whitley*, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490

(1995). Materiality does not require a defendant to demonstrate by a preponderance of the evidence that the absence of the error would have ultimately resulted in an acquittal or a life sentence. *Id.* at 1566-1567. The test is whether the error undermines confidence in the jury's sentence of death or conviction for capital murder. *Id.* 1566. This is not a sufficiency of the evidence test - that is, the defendant is not required to demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would have been insufficient evidence remaining to convict or return a sentence of death. *Id.* The reviewing court should view the favorable evidence and determine if it reasonably puts the whole case in such a different light so as to undermine confidence in the verdict. *Id.*; *See Lindsey v. King*, 769 F.2d 1034, 1042 (5th Cir. 1985)(suppressed impeachment evidence may have consequences for the case far beyond discrediting the witness' testimony.) Materiality must be assessed in terms of the suppressed evidence considered as a whole, not item by item. *Kyles v. Whitley, supra*, 115 S.Ct. at 1567. Prejudice under *Strickland* should be considered in the same manner. See also *Wesley v. Johnson*, 83 F.3d 714, 719 (5th Cir. 1996), *cert. denied*, 519 U.S. 1094, 117 S.Ct. 773.136, L.Ed.2d 718 (1997)(prejudice analysis should not focus on determination of outcome but on whether error ensures that the result of the proceeding was fundamentally unfair or unreliable); *Lockhart v. Fretwell*, 506 U.S.364, 371 113 S.Ct. 838, 122 L.Ed2d 180 (1993).

Thorough factual investigation is required for effective representation. *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932). "It is not enough to assume that defense counsel thus precipitated into the case thought that there was no defense, and exercised their best judgment in proceeding to trial without preparation. Neither they nor the court could say what a prompt and thorough-going investigation might disclose as to the facts." *Id.* at 58; *See Strickland v. Washington*, supra, 466 U.S. at 691. "Strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make a reasonable investigation or to make a reasonable decision that makes particular investigations unnecessary." *Strickland v. Washington, supra* 104 S.Ct. at 2066; See *Kimmelman v. Morrison*, 477 U.S. 365, 385, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986). Counsel's failure to object to the hearsay testimony is outside the range of competent assistance. *Elledge v. Dugger*, 823 F.2d 1439 (11th Cir. 1987). Based on counsel's investigator and discovery, he should have anticipated this damaging testimony and been prepared to object or at least attempt to rebut it.

The Fifth Circuit has discussed omissions by trial counsel as follows:

> Whether counsel's omission served a strategic purpose is a pivotal point in *Strickland* and its progeny. The crucial distinction between strategic judgment calls and plain omissions have echoed in the judgments of this court. For example, in *Nealy* we found counsel's performance deficient and stressed that at a post-conviction hearing, the defense counsel did not testify that such efforts would have been fruitless, nor did he claim that the decision not to investigate was part of a calculated trial strategy. He simply failed to make the effort. Counsel did not choose strategically or otherwise, to pursue one line of defense over another. Instead [he] simply abdicated his responsibility to advocate his client's cause.

Loyd v. Whitley, 977 F.2d 149, 158-159 (5th Cir. 1992). *cert. denied*. 508 U.S. 911, 113 S.Ct. 2343, 124 L.Ed.2d 253 (1993), citing Nealy v. Cabana, 764 F.2d 1173, 1178 (5th Cir. 1985).

Failure to interview witnesses or discover readily available evidence is an error in trial preparation, not strategy. *Kenly v. Armontrout*, 937 F.2d 1298, 1304 (8th Cir.), *cert. denied sub nom*, *Delo v. Kenley*, 502 U.S. 964, 112 S.Ct. 431, 116 L.Ed.2d 450 (1991). Any decision or judgment that flows from lack of diligence in preparation and investigation, therefore, is not protected by the presumption in favor of counsel having acted reasonably. *Id.* "Tactical decisions must be made in the context of a reasonable investigation, not in a vacuum. 'It is not enough to assume that counsel ... thought there was not defense, and exercised [his] best judgment ...'" *Bouchillon v. Collins*, 907 F.2d 589, 597 (5th Cir. 1990), *citing Powell v. Alabama, supra.*

ARGUMENT: CLAIM VII

THE AGGRAVATING FACTORS EMPLOYED IN THE TEXAS CAPITAL SENTENCING SCHEME ARE VAGUE AND DO NOT PROPERLY CHANNEL THE JURY'S DISCRETION IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In the case at bar, the trial judge instructed the jury, in pertinent part, to answer the following question during the punishment phase of the trial: "Do you find from the evidence beyond a reasonable doubt that there is a probability that the Defendant, Carlos Trevino, would commit criminal acts of violence that would constitute a continuing threat to society?" RR XXIV, 5-6; CR II, 184. During jury selection, the prosecutor continually informed the veniremen that "criminal acts of violence" was whatever the jurors thought it was, to include acts such as a property crime or smashing a car window, and the prosecutor asked the veniremen, "Can you wait and listen to the evidence and decide what, in your mind, is a criminal act of violence?"

A capital punishment statute is unconstitutional if it permits the arbitrary and capricious infliction of the death penalty. *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed2d 346 (1972). "A vague aggravating factor employed for the purpose of determining whether a defendant is eligible for the death penalty fails to channel the sentencer's discretion." *Stringer v. Black*, 503 U.S. 222, 235, 112 S.Ct. 1130, 117 L.Ed.2d 369 (1992). An aggravator which asks whether a defendant "exhibited utter disregard for human life" barely passes constitutional muster if it includes a limiting instruction that it was the action of a "cold-blooded, pitiless slayer." *Arave v. Creech*, 507 U.S. 463, 113 S.Ct. 1534, 123 L.Ed.2d 188 (1993). Cold-blooded and pitiless are not subjective, but instead describe a defendant's state of mind which is ascertainable from the surrounding facts. *Id.*

In Texas, there is no limiting instruction and there is no definition of the terms "probability", "criminal acts of violence," and "continuing threat to society." See e.g., *Patrick v. State*, 906 S.W.2d 481, 494 (Tex.Crim.App. 1995); *Chambers v. State*, 903 S.W.2d 21, 35 (Tex.Crim.App. 1995); *Clark v. State*, 881 S.W.2d 682, 698-699(Tex.Crim.App. 1994). This leaves Texas juries to guess at the meaning of these terms and thus at the meaning of the entire first special issue. Since

these terms are undefined, the prosecutor was continually able to suggest to the venire men that assaults or property crimes could be considered as criminal acts of violence thereby rendering a defendant eligible for the death penalty. This allows a criminal act of violence to be anything a juror wants to believe it is. This is why the Texas scheme is unconstitutional. A statute which permits jurors to return a death sentence based on anything they want to believe is arbitrary and capricious and therefore unconstitutional under the Eight and Fourteenth Amendments to the United States Constitution. The aggravator found in the first special issue fails to channel the sentencer's discretion, in violation of the Eighth and Fourteenth Amendments. The sentence in this case should be vacated and Petitioner should receive a new trial.

ARGUMENT: CLAIM VIII

ARTICLE 37.071 OF THE TEXAS CODE OF CRIMINAL PROCEDURE IS UNCONSTITUTIONAL IN THAT ITS 12-10 RULE MAY ARBITRARILY FORCE THE JURY TO CONTINUE DELIBERATING AFTER EVERY JUROR VOTED TO ANSWER A SPECIAL ISSUE IN FAVOR OF THE APPLICANT.

Article 37.071 of the Texas Code of Criminal Procedure does not allow the trial judge to inform the jurors that a failure to agree on the special issues will force the trial judge to sentence a defendant to life in prison. Article 37.071 allows an instruction that states merely that a life sentence will be imposed if ten or more jurors vote for special issue number two. Counsel is prohibited from informing the jurors that a deadlocked jury will result in a life sentence. *Draughton v. State*, 831 S.W.2d 331 (Tex. Crim. App. 1992). It is arbitrary and capricious, however, to prevent jurors from sentencing a defendant to life in prison if each juror believes that a different mitigation circumstance made the death penalty inappropriate. *McCoy v. North Carolina*, 494 U.S. 433, 110 S.Ct. 1227, 108 L.Ed.2d 369 (1990); *Mills v. Maryland*, 486 U.S.367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988).

Under Article 37.071, the jurors are instructed that they are not required to agree on the evidence that supports their answers to the special issues, but the 12-10 rule is unconstitutional since it may still arbitrarily force the jury to continue deliberating after one juror voted to answer special issue two in favor of a defendant. Article 37.071 is arbitrary and capricious in that it fails to inform the jurors that a sentence of life will result unless all twelve jurors answer "no" to special issue number two.

IX.

THE STATE COURT'S JUDGMENT IN DENYING PETITIONER'S CLAIMS III THROUGH VIII WAS CONTRARY TO, OR INVOLVED AN UNREASONABLE APPLICATION OF CLEARLY ESTABLISHED FEDERAL LAW.

Standard of Review under 28 U.S.C. § 2254(d)(1).

Congressional legislation in 1867 provided the federal courts with the "power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation

of the Constitution, or of any treaty or law of the United States...." *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 1503, 146 L.Ed.2d 389 (2000), *citing* Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385. This federal habeas corpus statute has been amended over the years, but the scope of this jurisdictional power to the federal courts remains the same. *Williams v. Taylor*, supra, 120 S.Ct. at 1503. The law is clear that a petitioner may not be entitled to the remedy of habeas merely because constitutional error occurred in the proceedings that led to the state court conviction. *Id.* citing *Stone v. Powell*, 428 U.S. 465, 96 S.Ct. 3037, 40 L.Ed.2d 1067 (1976); *Brecht v. Abrahamson*, 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993). "On the other hand, errors that undermine confidence in the fundamental fairness of the state adjudication certainly justify the issuance of the federal writ." Williams v. Taylor, supra, 120 S.Ct. at 1503, citing League v. Lane, 489 U.S.288, 311-314, 109 S.Ct. 1060, 106 L.Ed.2d 334 (1989). A violation of the right to the effective assistance of counsel is such an error. Williams v. Taylor, supra, 120 S.Ct. at 1504, citing *Strickland v. Washington*, 466 U.S. 688, 697-697, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) amended 25 U.S.C. § 2254, in relevant part, as follows:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States.

This amendment does not alter the underlying grant of jurisdiction to federal courts pursuant to § 2254(a), but merely, "relates to the way in which a federal habeas court exercises its duty to decide constitutional questions." *Williams v. Taylor, supra*, 120 S.Ct. at 1505. As to this duty to decide constitutional questions:

> When federal judges exercise their federal-question jurisdiction under the "judicial power" of Article III of the Constitution, it is "emphatically the province and duty of those judges to 'say what the law is.'" *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 177, 2L.Ed. 60 (1803). At the core of this power is the federal courts' independent responsibility -- independent from its coequal branches in the Federal Government, and independent from the separate authority of the several states -- to interpret the federal law. A construction of AEDPA that would require the federal courts to cede this authority to the courts of the States would be inconsistent with the practice that federal judges have traditionally followed in discharging their duties under Article III of the Constitution. If congress had intended to require such an important change in the exercise of our jurisdiction, we believe it would have spoken with much greater clarity than is found in the text of AEDPA ... This basic premise informs our interpretation of both parts of § 2254(d)(1): first, the requirement that the determinations of state courts be tested only against "clearly established Federal law, as determined by the Supreme Court of the United States," and second, the

> prohibition on the issuance of the writ unless the state court's decision is "contrary to, or involved an unreasonable application of," that clearly established law.

Williams v. Taylor, supra, 120 S.Ct. at 1505.

The "clearly established law" requirement.

The anti-retroactivity rule recognized in *Teague v. Lane, supra*, which prohibits a petitioner seeking federal habeas relief from relying on a rule of federal law that had not been declared until after the petitioner's state conviction became final (i.e. a "new rule"), "is the functional equivalent of a statutory provision commanding exclusive reliance on 'clearly established law.'" *Williams v. Taylor, supra*, 120 S.Ct. at 1506. "It is perfectly clear that AEDPA codifies *Teague* to the extent that *Teague* requires federal habeas courts to deny relief that is contingent upon a rule of law not clearly established at the time the state conviction became final." *Id.* "[A] federal habeas court operates within the bounds of comity and finality if it applies a rule 'dictated by precedent existing at the time the defendant's conviction became final." *Id., citing Teague v. Lane*, 489 U.S. at 301. "A rule that 'breaks new ground or imposes a new obligation on the States or the Federal Government' .. falls outside this universe of federal law." *Id.*, citing *Teague v. Lane, supra*, 489 U.S. at 301.

28 U.S.C. § 2254(d)(1), in discussing the "clearly established law" requirement, limits this area of relevant law to that "determined by the Supreme Court of the United States." *Williams v. Taylor, supra,* 120 S.Ct. at 1506. Federal district courts cannot create law regarding a constitutional principle requested in a federal habeas petition, since it is the Supreme Court which must have already established the legal ground regarding this constitutional principle. *Id.* 120 S.Ct. at 1506-1507. This clause at § 2254(d)(1) "extends the principal of *Teague* by limiting the source of the doctrine on which a federal court may relying in addressing the application for a writ." *Williams v. Taylor, supra,* 120 S.Ct. at 1507, *citing Lindh v. Murphy,* 96 F.3d 856, 869 (7th Cir. 1996). 2254(d)(1) does not, however, "limit the federal courts' independent interpretive authority with respect to federal questions." *Williams v. Taylor, supra,* 120 S.Ct. at 1507, *citing Lindh v. Murphy, supra,* 96 F.3d at 869.

A rule of law may be "clearly established" for habeas purposes under 2254(d)(1) even if the rule of law is stated as a generalized standard rather than as a bright-line rule. *Williams v. Taylor, supra,* 120 S.Ct. at 1507. If a rule of law requires a determination on a case-by-case basis, the application of such a rule of law does not create a new rule unless the result is "so novel that it forges a new rule, one not dictated by precedent." *Id., citing Wright v. West*, 505 U.S. 277, 308-309, 112 S.Ct. 2482, 120 L.Ed.2d 225 (1992).

It is up to the independent evaluation of the federal court as to whether or not a rule was "clearly established" at the time of the rendering of the final judgment of the state court. *Williams v. Taylor, supra*, 120 S.Ct. at 1507. The phrase "clearly established law" in 2254(d)(1) was not intended to modify this independent obligation of the federal courts. *Williams v. Taylor, supra*, 120 S.Ct. at 1508. As for this independent evaluation, the Supreme Court stated:

> The duty of the federal court in evaluating whether a rule is "new" is not the same

> as deference; .... League does not direct federal courts to spend less time or effort scrutinizing the existing federal law, on the ground that they can assume the state courts interpreted it properly. The maxim that federal courts should "give great weight to the considered conclusions of a coequal state judiciary" ... does not mean that we have held in the past that federal courts must presume the correctness of a state court's legal conclusions on habeas, or that a state court's incorrect legal determination has ever been allowed to stand because it was reasonable. We have always held that federal courts, even on habeas, have an independent obligation to say what the law is.

Williams v. Taylor, supra, 120 S.Ct. at 1508, *citing Wright v. West, supra,* 505 U.S. at 305 (emphasis in original).

The "contrary to, or an unreasonable application of" requirement.

It is unclear what Congress intended in the use of the phrase "contrary to" and the phrase "unreasonable application of" in 2254(d)(1). *Williams v. Taylor, supra*, 120 S.Ct. at 1508. A fair reading of 2254(d)(1) reveals that a federal court cannot issue a habeas writ unless the state habeas court "was wrong as a matter law or unreasonable in its application of law in a given case." *Id.* "Whether or not a federal court can issue the writ under [the] 'unreasonable application clause,' the statute is clear that habeas may issue under § 2254(d)(1) if a state court 'decision' is 'contrary to ... clearly established Federal law.'" *Id.* Both phrases in 2254(d)(1) may be implicated in a given case. *Id.*

The first step a federal habeas court must take under its 2254(d)(1) analysis is to evaluate the state habeas court's determinations of fact, including a "mixed question" that rests on a finding of fact, to ensure the state court's determinations "did not conflict with federal law or apply federal law in an unreasonable way." *Id.* at 1509 (citation omitted). A federal court is not required to defer to a state court's application of federal law if the federal court, in its independent judgment, believes the state court's application was in error. *Id.* at 1510. A state court judgment that initially seems reasonable, but after a "thorough analysis by a federal court produces a firm conviction that that judgment is infected by constitutional error," is an "unreasonable" judgment under 2254(d)(1) "even though that conclusion was not immediately apparent." *Id.* at 1511. "If, after carefully weighing all the reasons for accepting a state court's judgment, a federal court is convinced that a prisoner's custody -- or, as in this case, his sentence of death -- violates the Constitution, that independent judgment should prevail." *Id.*

The ineffective assistance of counsel claim.

In the case at bar, Petitioner contends that he was denied his right to effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution since his trial attorney was precluded from voir diring certain jurors on DNA evidence, failed to ensure that his Motion for New Trial regarding his own ineffective assistance claim was ruled upon with an evidentiary hearing, and failed to object to inadmissible hearsay from a witness regarding damaging statements by Petitioner. The threshold question under 2254(d)(1) is whether the Petitioner seeks

to apply a rule of law that was clearly established at the time his state court conviction became final. *See Williams v. Taylor, supra*, 120 S.Ct. at 1511. Petitioner's state conviction became final on direct appeal on April 4, 2001, when the Texas Court of Criminal Appeals denied relief. *Trevino v. State*, 991 S.W.2d 849 (Tex. Crim. App. 1999). The merits of this claim are clearly governed by the holding in *Strickland v. Washington*, 466 U.S. 688, 104 S.Ct. 2052, 80L.Ed.2d 674 (1984). The *Strickland* test is "clearly established Federal law, as determined by the Supreme Court of the United States," so Petitioner is entitled to relief under 2254(d)(1) if the state court's decision rejecting his ineffective assistance claim was either "contrary to, or involved an unreasonable application of," that established law. *See Williams v. Taylor, supra*, 120 S.Ct. at 1512.

The state court determination was unreasonable since the state court failed to evaluate the importance of a thorough factual investigation as it relates to the presumption in favor of counsel having acted reasonably. Thorough factual investigation is required for effective representation. *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932). "It is not enough to assume that defense counsel thus precipitated into the case thought that there was no defense, and exercised their best judgment in proceeding to trial without preparation. Neither they nor the court could say what a prompt and thorough-going investigation might disclose as to the facts." *Id.* at 58. The Fifth Circuit has discussed counsel's omissions as follows:

> Whether counsel's omissions served a strategic purpose is a pivotal point in *Strickland* and its progeny. The crucial distinction between strategic judgment calls and plain omissions has echoed in the judgments of this court. For example, in *Nealy*, we found counsel's performance deficient and stressed that at a post-conviction hearing, the defense counsel did not testify that such efforts would have been fruitless, nor did he claim that the decision not to investigate was part of a calculated trial strategy. He simply failed to make the effort. Counsel did not choose, strategically or otherwise, to pursue one line of defense over another. Instead [he] simply abdicated his responsibility to advocate his client's cause.

Loyd v. Whitley, 977 F.2d 149, 158-159 (5th Cir. 1992), *cert. denied*, 508 U.S. 911, 113 S.Ct. 2343, 124 l.Ed.2d 253 (1993), *citing Nealy v. Cabana*, 764 F.2d 1173, 1178 (5th Cir. 1985) (emphasis in original).

The state court's order in this case at bar stated that, "A reviewing Court is not entitled to speculate as to the reasons why trial counsel acted as he did, rather a reviewing court must presume that the actions were taken as part of a strategic plan for representing the client." *See* attached Exhibit 5, Court's Order, at p. 26. The state court did not entertain the possibility that thorough factual investigation is required for effective representation as stated in *Powell v. Alabama, supra*. The state court thus failed to accord appropriate weight to the failure of trial counsel to complete a thorough factual investigation (i.e. failed to present favorable DNA evidence, failed to prepare to challenge DNA evidence, and failed to object to damaging inadmissible hearsay evidence) before making any alleged strategic decisions. Pursuant to 2254(d)(1), therefore, Petitioner's application for a writ of habeas corpus should be granted since the adjudication of the claim resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States in *Powell*.

In the case at bar, Petitioner contends that he was denied his right to effective assistance of counsel as guaranteed by the Sixth Amendment of he United States Constitution since his trial attorney failed to subject the prosecution's case to meaningful adversarial testing. The threshold question under 2254(d)(1) is whether petitioner seeks to apply a rule of law that was clearly established at the time his state court conviction became final. *See Williams v. Taylor, supra,* 120 S.Ct. at 1511. Petitioner's state court conviction became final on direct appeal on April 4, 2001, when the Texas Court of Criminal Appeals denied relief. *Trevino v. State,* 991 S.W.2d 849 (Tex.Crim.App. 1999). The merits of this claim are clearly governed by the holding in *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). The *Cronic* test is "clearly established Federal law, as determined by the Supreme Court of the United States," so Petitioner is entitled to relief under 2254(d)(1) if the state court's decision rejecting his ineffective assistance claim was either "contrary to, or involved an unreasonable application of," that established law. *See Williams v. Taylor, supra,* 120 S.Ct. at 1512.

The state court determination was unreasonable since the state court never applied the facts of the case at bar to the law as established by *Cronic*. Pursuant to 2254(d)(1), therefore, Petitioner's application for a writ of habeas corpus should be granted since the adjudication fo the claim resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States in *Cronic.*

The failure of the Trial Court to hold an evidentiary hearing on a Motion for New Trial claim.

Petitioner contends that he was denied his right to an evidentiary hearing and ruling when his trial counsel filed a Motion for new Trial claiming that he had been provided ineffective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution because the trial judge held no hearing or issued any ruling. Petitioner was denied his right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution when his counsel failed to object to inadmissible hearsay. Petitioner was also denied the right of confrontation and cross-examination in violation of the United States Constitution. The threshold question under 2254(d)(1) is whether Petitioner seeks to apply a rule of law that was clearly established at the time his state court conviction became final. *See Williams v. Taylor, supra,* 120 S.Ct. at 1511. Petitioner's state court conviction became final on direct appeal on April 4, 2001, when the Texas Court of Criminal Appeals denied relief. *Trevino v. State,* 991 S.W.2d 849 (Tex.Crim.App. 1999). The merits of this claim are clearly governed by the holding in *Schad v. Arizona*, 501 U.S. 624, 111 S.Ct. 2491, 115 L.Ed.2d 555 (1991). The *Schad* test is "clearly established Federal law, as determined by the Supreme Court of the United States," so Petitioner is entitled to relief under 2254(d)(1) if the state court's decision was either "contrary to, or involved an unreasonable application of," that established law. *See Williams v. Taylor, supra.*, 120 S.Ct. at 1512.

The state court determination was unreasonable since the state court never applied the facts of the case at bar to the law as established by *Schad.* In Fact, the state court claimed that Texas law precluded such a claim. *See* attached Exhibit 5. Pursuant to 2254(d)(1), therefore, Petitioner's application for a writ of habeas corpus should be granted since the adjudication of the claim resulted

in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States in *Schad.*

IX.

THE PRESUMPTION OF CORRECTNESS OF 28 U.S.C.2254(d)(1) & (e) SHOULD NOT ATTACH TO STATE COURT FINDINGS OF FACT.

The law in general.

28 U.S.C. 2254(d)(2) and 2254(e)(1) state as follows:

> (d) An application for a writ of habeas corpus of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim.....
>
> (2) resulted in a decision that was based on an **unreasonable determination** of the facts in light of the evidence presented in the State court proceeding.
>
> (e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a **determination of a factual issue** made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(emphasis added.). Section 2254(d)(2) provides for habeas relief if the state court's determination of the facts was **unreasonable** in light of the evidence presented in the state court proceeding. If the state court's determination of the facts was reasonable, then 2254(e)(1) comes into play and presumes the court's **reasonable** determination to be correct unless Petitioner rebuts this presumption by clear and convincing evidence. A petitioner is entitled to an evidentiary hearing to present this rebuttal evidence. *Demosthenes v. Baal*, 495 U.S. 731, 735, 110 S.Ct. 2223, 109 L.Ed.2d 762 (1990); *Patton v. Yount*, 467 U.S. 1025, 1028 104 S.Ct. 2885, 81 L.Ed.2d 847 (1984); *Sumner v. Mata*, 449 U.S. 539, 550, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981).

The above language from 2254(d)(2) and (e) regarding "determination of the facts" and "determination of a factual issue" language is identical to the language of superseded 28 U.S.C. § 2254(d). "[I]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it. *Evans v. United States*, 504 U.S. 255, 260, 112 S.Ct. 1881, 119 L.Ed.2d 57 (1992). "Determination of a factual issue" from superseded 2254(d) refers